IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Dymond, 2004 NSPC 49

Date: 20040525
Docket: 1285904, 1285905
Registry: Kentville

Between:

Her Majesty the Queen

v.

Roger Dymond

Judge: The Honourable Judge Alan T. Tufts

Heard: March 3, 2004, at Kentville, Nova Scotia

(Oral) decision: May 25, 2004

Charge: On or about the 8th day of March 2003, at, or near Berwick, Nova Scotia, did without reasonable excuse fail to comply with a demand made to him by a peace officer to provide samples of his breath as in the opinion of a qualified technician were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) CC.

Having the care, charge or control of a vehicle that was involved in an accident with a vehicle, with intent to escape civil or criminal liability, fail to stop his vehicle and give his name and address contrary to Section 252(1) CC.

Counsel: Shane Parker, for the Crown
Curtis Palmer, for the defence

By the Court:

[1] This is the matter of R. v. Roger Dymond. The defendant is charged with refusing the breathalyzer and leaving the scene of an accident, contrary to s. 254(5) and s. 252(1) respectively, of the **Criminal Code**.

[2] The following are the issues to be resolved:

1. Was the defendant's arrest by Constable Foley for leaving the scene of the accident and impaired driving lawful;
2. Did Constable Foley have reasonable and probable grounds to give the breathalyzer demand, particularly, did Constable Foley have reasonable and probable grounds to believe that the defendant had operated a motor vehicle;
3. Was the defendant's right to counsel breached because he was unable to contact his choice of counsel;
4. Was the statement alleged to have been made to Constable LaPlante by the defendant admissible, and
5. Was the defendant properly identified as the person arrested in court and should the Crown's motion to re-open its case be granted to hear evidence of identification.

THE FACTS

[3] The events in question took place March 8, 2003. An automobile registered to the defendant was seen colliding with a parked car on Highway #1 near Berwick. The driver of this car who left on foot was heard running from the area. The accident occurred after 8 p.m. and the police arrived around 8:30 p.m. Constables Nesbit and Murkinson were present. Constable Foley, of New Minas, with a “ride along” member of the public, and Constables McEachern and LaPlante from Kingston were also there.

[4] Constable Foley queried the license plate of the subject vehicle and determined the defendant was the registered owner. The subject vehicle had been left at the scene, and Constable Foley left there to travel to the defendant's residence a short distance away; the defendant being identified as the registered owner. When he arrived at the residence the defendant was not present, however he spoke with the defendant's spouse. When Constable Foley was there the defendant called. Constable Foley was able to learn by

entering the livingroom and looking at the telephone call display that the defendant was the caller, and the spouse confirmed this, and it appeared that the call came from the Berwick General Store.

[5] Constable Foley left and went to the store. Throughout, Constable Foley and the other officers appeared to be in regular radio contact. Constable Foley was travelling back to the store he advised the other officers by radio the defendant was at the store and that he was going to that location. The store was in fact near the accident scene approximately one kilometre away at the intersection of Commercial Street and Highway #1 in Berwick.

[6] Constable Foley testified that Constable McEachern told him that they; that is, Constables McEachern and LaPlante were near the store and that the footprints they were following led to the store. I underline that last phrase and I will come back later to this point. She also advised that they were on foot and would arrive at the store shortly.

[7] Constables McEachern and LaPlante had both followed the footprints from the accident scene. The path led north into the woods and along a snowmobile path, eventually looping back onto Highway #1 west of the accident scene and approximately 300 feet east of the store. Constable McEachern testified that she had radio contact with Constable Foley to the effect that the defendant was at the store. She testified that she and Constable LaPlante were in the area. She did not say that she told Constable Foley that the footprints led to the store. Constable McEachern also testified that she and Constable LaPlante were still in the snow when they were advised by Constable Foley that the defendant was at the store.

[8] When Constable Foley arrived at the Berwick General Store parking lot he saw the defendant getting into a vehicle as a passenger with two other people. It appears as if this vehicle was picking him up and he was about to close the door when Constable Foley approached. Constable Foley confronted the defendant and after only a very few introductory remarks placed the defendant under arrest. It appears it was at this time that Constable Foley and LaPlante, along with Constable Nesbit, arrived. Constable McEachern and LaPlante were picked up after they followed the footprints to the highway and after Constable McEachern was told the defendant was at the store. Constable McEachern testified she was

concerned about officer safety, which prompted her to ask Constable Nesbit to pick up her and Constable LaPlante.

[9] There is a conflict in the testimony of Constables McEachern and LaPlante as to whether the vehicle stopped in the short way to the store to follow the tracks. I will come back to this later. What transpired at the store parking lot is confusing. It appears Constable Foley arrived there shortly after 9 o'clock. Constable McEachern confirmed she arrived at 9:05 and Constable Foley was seen by her speaking to the defendant near a pole. Constable Foley testified he had the defendant in custody in the police car at 9:09 and formally advised him for his reasons for the arrest at 9:10. Thereafter he was given his Charter rights and the breathalyzer demand was read at 9:13. The defendant indicated he wanted to speak to a lawyer.

[10] Constable Foley testified that at some point he left the scene with the defendant and arrived at the Berwick Detachment a short distance away at 9:41. When asked specifically why there was a delay between 9:13 when he described the demand being made and until 9:41 Constable Foley responded that it was at this time that "we were discussing the boot" with Constable McEachern. Constable LaPlante maintains he and Constable Foley left the scene at 9:15 and would have arrived much earlier than Constable Foley maintained given the time of the other events at the police detachment which Constable LaPlante described. At some point at the parking lot the defendant was searched and his boot was removed. Constable McEachern helped with the search and removed his boot. When this happened relative to the arrest and the breathalyzer demand is not clear. Constable Foley also testified at some point Constable McEachern and LaPlante told him that the footprints were heading to the store and that Constable McEachern had told him the prints were the same as the boots worn by the defendant. When this conversation took place is not clear.

[11] Constable McEachern says that at some point she took the boots and the keys which had been taken from the defendant and left. She went to an area close to the scene and compared the footprints and allowed Constable Murchison to try the keys in the subject vehicle, which apparently worked. If, when and where she spoke to Constable Foley after this is not clear.

[12] Constable Foley testified that after arriving at the detachment an attempt was made to call Mr. Manning, the defendant's choice of counsel, at his office. March 8, 2003 was a Saturday evening and no attempt was made to call Mr. Manning at his home. Duty counsel was called at 9:49 according to Constable Foley's testimony and he, the defendant, finished up with duty counsel at 9:58. He was then introduced to Constable McEachern, the breath technician, and refused to provide a sample. She testified the defendant was introduced to her at 9:50 pm. - 9:53 pm. and the refusal was at 9:58 pm., reasonably consistent with the testimony of Constable Foley. Constable Foley made no mention, nor was he asked, of any conversation between Constable LaPlante and the defendant, nor of any calls made by the defendant to his wife.

[13] Constable LaPlante testified he travelled back to the detachment in the front seat of the same car as Constable Foley, with the defendant in the back. Interestingly, there was no mention of Mr. Moran, Constable Foley's "ride along", who Constable Foley says never left the vehicle throughout the entire events in question.

[14] Constable LaPlante witnessed the arrest, the Charter caution and the demand. He says they left the scene at 9:15. At the police detachment he described how the defendant wanted to speak to his wife and was told by Constable Foley that the conversation was not private. He then describes overhearing the defendant speak to his spouse in French. Constable LaPlante is also French, and he later spoke to the defendant in French as well. Constable Foley is present throughout some of these events. During his conversation with the spouse and with Constable LaPlante the defendant made apparently incriminating statements, the admissibility of which is challenged. However, Constable LaPlante says the conversation with the defendant was at 9:35 and was after the defendant spoke to his lawyer. This is in direct conflict with Constable Foley's testimony.

[15] There are clearly factual issues which must be resolved. Those are:

1. What did Constable Foley know when the demand was given, ie., did he have reasonable and probable grounds to give the demand, and
2. Did Constable LaPlante have a conversation with the defendant, and if so, when did this happen.

[16] When Constable Foley left the defendant's residence he knew only that the defendant was the registered owner of the subject vehicle. He knew the defendant was not at home and that he was at a store approximately one kilometre from the accident scene, the accident having occurred almost one hour previously. I find as a fact that he was not told that the tracks which Constable McEachern and LaPlante were following led back to the store. She never told him that. It is quite clear that Constable Foley simply assumed the defendant must have been the driver of his own vehicle, the one at least registered to him. Furthermore I find as a fact that Constable McEachern did not advise Constable Foley at the store parking lot about the footprints and where they were leading <u>before he made the demand</u>. It is quite clear Constable Foley dealt with the defendant forthwith after arriving at the store. He arrested him, he took him to the police car and gave him the demand. I can only conclude that this was all done before the boot was removed or at least before any useful information was learned from it. It may be that the defendant was searched, his keys removed and the boot taken just before or as he was entering the police car, however the demand was made before Constable McEachern advised Constable Foley of anything.

[17] In my opinion, once Constable McEachern and LaPlante learned that Constable Foley was going to the store they abandoned their footprint tracking. At this point they chose to drive there with Constable Nesbit. It may be that Constable McEachern may have attempted to follow the tracks from the moving police car, however, I do not believe that she did and prefer the evidence of Constable LaPlante on this point. She did not carefully follow the tracks to the store. She simply assumed that the driver was at that store as Constable Foley reported. This may explain why she left the area to check the boot against the print further back.

[18] I cannot reconcile the testimony of Constable LaPlante about the time he left the scene, his observations of the defendant at the detachment and the conversation he had with the defendant at the detachment with the times testified to by Constable Foley. I can only conclude that one of them must be wrong. Constable Foley made detailed notes as to the time he testified to. Constable LaPlante did not. While Constable LaPlante's recollections and time sequences seem to make sense and fit with the other evidence however, in light of Constable Foley's written notes it is impossible to rely on

Constable LaPlante's time sequence with any confidence. Given that Constable Foley made these notes presumably contemporaneously with the events in question I cannot ignore them when assessing Constable LaPlante's testimony. Given Constable Foley's testimony as to times it is impossible to conclude when the conversation Constable LaPlante had with the defendant in French occurred. I cannot say it occurred after he spoke to counsel as he suggested, because the defendant was introduced to the breath tech, Constable McEachern, at that point, according to Constable Foley. The conversation between Constable LaPlante and the defendant must have occurred before he spoke to counsel. I find this as a fact.

[19] I return now to address the issues to be resolved.

[20] I will deal with issue number 2, first. **R. v. Landry,** 2002 NSSC 277 sets out in complete form the law related to reasonable and probable grounds to believe a defendant committed the offence of impaired driving. The required belief must be objectively and subjectively held, and must be present when the arrest was made and the demand given, more particularly when the demand is given. As I indicated above, Constable Foley was not aware the footprint tracks led to the store. He only knew the defendant's vehicle was involved in a motor vehicle accident, he was at a nearby store and had recently called home. In my opinion it is not reasonable and probable that he was driving the vehicle without something to connect him more directly to the accident other than the fact that it was his registered vehicle. I do not believe one can objectively conclude this. Certainly when Constable Foley made the demand this connection was not present. He did not have reasonable and probable grounds to give the demand. The demand was not properly made and in accordance with the requirements of the **Criminal Code**. It is not an offence to refuse an improper demand, accordingly he is found not guilty of the charge under s. 254.

[21] Regarding issue No. 3, the defendant has the right to choose counsel of his choice upon detention, see **Leclair**, **and Ross v. The Queen**, (1989), 46 CCC (3d) 129 (S.C.C.). However he must be reasonably diligent in the exercise of that right. Reasonably diligent in the exercise of the right depends upon the context facing the defendant. Here the defendant asked to speak to Mr. Manning. This was a Saturday evening at approximately 9:30. A call was made by Constable Foley to Mr. Manning's office. No call was

made to his house. No effort was made to locate a number. Constable Foley directed the defendant to call duty counsel. The defendant agreed. Constable Foley contacted duty counsel. Clearly Constable Foley did not make every reasonable effort to allow the defendant to contact Mr. Manning. Constable Foley was controlling the phone and making the calls. He ought to have at least located Mr. Manning's home number and tried to call him there, however the defendant made no further request to speak to Mr. Manning and agreed to speak to, and did in fact speak to, duty counsel, and received advice. In my opinion the defendant's right to counsel of choice was breached by Constable Foley's action, or inaction, relative to contacting or not contacting Mr. Manning. However, this violation should not result in the exclusion of any evidence.

[22] Given the disposition of the s. 254 matter it is not necessary for me to expand significantly other than to say I believe that Constable Foley acted in good faith notwithstanding that he should have contacted Mr. Manning at his home given that he controlled the phone and more importantly the defendant did in fact speak to counsel and apparently got legal advice and never requested further opportunity to contact Mr. Manning.

[23] Regarding issue No. 4, the Crown concedes that if the conversation between Constable LaPlante and the defendant occurred before he spoke to counsel that it is not admissible because it violates the obligation to “hold off” until the defendant spoke to counsel. Given my findings that the conversation in fact occurred before the defendant spoke to counsel the statement is not admissible.

[24] Regarding issue No. 1, was the defendant's arrest lawful? Did Constable Foley have reasonable and probable grounds to make the arrest? - see **R. v. Storrey** [1990] 1 S.C.R. 241. It is not necessary for me to repeat what Constable Foley knew upon his arrival at the store when he encountered the defendant, as I described it above. I disagree with the Crown's submission that Constable Foley knew the tracks led to the store. I do not believe he was told that and further I do not believe the officers in fact followed the tracks to that location. I do not believe the remaining discernable facts and knowledge held by Constable Foley constitute reasonable and probable grounds as that is defined in **R. v. Storrey**, *supra*, and the other authorities to justify the arrest. However, I am satisfied that Constable Foley did have

articulable cause to detain the defendant. I believe the test in **R. v. Simpson** (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) has been met. The detention is for investigative purposes only. In my opinion the scope of a lawful search and seizure is limited in my opinion. I do agree that a search of the defendant for security purposes is proper, including the discovery of the vehicle keys. However I cannot agree that the seizure of the boot falls within that proper limit. In my opinion the seizure of the boot is outside the limits prescribed in **R. v. Ferris,** (1998), 126 C.C.C (3d) 298 (B.C.C.A.) and **R. v. Murray**, (1999), 136 C.C.C (3d) 197 (Que. C.A.)cases both referred to in the Crown's brief. Accordingly the evidence of the keys is admissible. The seizure of the boot violates the defendant's s. 9 rights. In these circumstances I would not admit the evidence of the boot, however, again a complete analysis of the reasons is not necessary, given the result. I will proceed to complete my analysis on the basis and assumption that the boot print is admissible.

[25] Finally, has the Crown proven beyond a reasonable doubt that it was the defendant that fled the scene of the accident to avoid liability. The admissible evidence includes the following. A motor vehicle registered to the defendant is seen driving in an erratic manner and colliding with a parked car. The defendant is at a store approximately one kilometre away with the keys to the vehicle in his pocket and showing signs of impairment. Footprints left by the driver of the vehicle involved in the accident lead in the direction of the store where the defendant was. Boots worn by the defendant match the footprints found leading from the accident scene. I make no adverse inference from the fact the defendant was getting into another vehicle. In fact it is possible he was travelling with these other people throughout. The presence of the keys in the pocket is not determinative, as many people have two or more sets of keys. The boot prints, while somewhat persuasive, are again not determinative. There is no evidence as to how unique this footwear was or whether there was any distinguishing marks or characteristics which would narrow these prints to the defendant's boots more precisely, even if the prints were admissible, which I concluded earlier that they were not.

[26] The fact that the defendant was at a nearby store is certainly highly suspicious and while the boots and keys point to the defendant's guilt all of these factors are not conclusive. I am not persuaded beyond a reasonable doubt that the defendant is guilty under s. 252 (1) of the **Criminal Code**.

[27] I want to refer very briefly to the last issue, ie., the issue of identification in court. Counsel has agreed that the defendant before the Court was never identified by any witness as the person arrested or detained by the police on the evening in question. There was nothing in the testimony of any of the witnesses which otherwise indicated the defendant, such as pointing or nodding in the direction of the defendant or other non-verbal indications which I recall from my observations of the witnesses. However, given my disposition of the matters above it is not necessary for me to rule on this matter and in any event, nor on the Crown's motion to reopen its case for this limited purpose. So, in summary, Mr. Dymond, you are found not guilty of both charges and you are free to go sir.

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ALAN T. TUFTS, J.P.C.