IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Landry, 2002 NSSC 277

Date: 20021220
Docket: CR AM 3927 (180126)
Registry: Amherst

Between:

Her Majesty The Queen

v.

Thomas William Landry

Judge: The Honourable Justice A. David MacAdam

Heard: September 25, in Amherst, Nova Scotia
Written submission: October 1, 2002

Written Decision: December 20, 2002

Counsel: **Bruce C. Baxter** for the appellant
Thomas W. Landry, self-represented

By the Court:

[1] Following the presentation of Crown evidence in respect to charges against the respondent, Thomas Landry, that he, "having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood did have the care and control of a motor vehicle contrary to the provisions of s. 253 (b) of the *Criminal Code*", and of operating a motor vehicle while "his ability was impaired by alcohol or a drug, contrary to s. 253(a), the Provincial Court Judge inquired of the unrepresented accused whether he wished to give evidence, to which Mr. Landry responded in the negative. The Judge informed Crown counsel that he could have advised the accused not to take the stand because, in his opinion, there was "no *prima facie* case".

[2] In his reasons, he continued:

> ... I have no doubt at all that the officer in the circumstances believed that this man was probably impaired but no reasonable person ... would come to the conclusion on the basis of a balance of probabilities that the accused was probably impaired. I think the most the officer could have gotten from the circumstances by the time he made his conclusion and said you're under arrest for impaired driving was that there was a suspicion. There may have even been a belief but ... there's nothing much to back it up except the smell of alcohol, what he interpreted as some avoidance of facial contact, and nothing about bloodshot eyes, what was called staggering, and the officer frankly admitted that some of that was caused by trying to get around the paraphernalia on the ground that's used for hoisting the vehicle, or on the floor, and that could happen to anyone ... .

He later continued:

> ... the mere smell of alcohol is enough to give one a suspicion which is enough to ask for the roadside screening device and I think it would have made eminent sense to have asked for it in this case. I don't think objectively speaking there were reasonable and probably *(sic)* grounds to make the demand in this particular case. I will not admit the certificate and count one is dismissed. There is not enough evidence to conclude beyond a reasonable doubt that he was impaired without a certificate of analysis interpreted by an expert. So both counts are dismissed.

[3] The Crown now appeals.

[4] In its brief on appeal, the Crown suggests the following statement of facts:

1. On the early afternoon of November 27th, 2001, Cst. Daniel P. Murray, (Murray) a police constable employed by the Town of Amherst, was assisting the Vehicle Compliance Division of the Department of Transportation, in inspecting the taxicabs of the town.

2. The inspections were taking place a *(sic)* the Town Garage, located off McCully Street, Amherst, Cumberland County.

3. When Murray returned from his lunch break at 1:00 pm or so, he observed the Respondent, Thomas William Landry, (Landry) standing beside one of his taxicabs.

4. Landry followed Murray into the building where they spoke briefly and Murray advised Landry to bring his car into the building while they were waiting for the Compliance Division officer to return.

5. Murray went to the back part of the shop to open the large bay doors so Landry could drive his cab onto the hoist. He observed Landry drive his vehicle onto the hoist area and exit it.

6. Murray observed that Landry "seemed to turn away" from him and "he tripped over the arms on the hoist". Landry was having a hard time manoeuvring around the arms so Murray got directly in front of him.

7. Once Murray was in front of Landry he got a "good smell" of alcoholic beverage coming from Landry. He then arrested him for impaired driving.

8. Upon being arrested Landry seemed to "relax more" and displayed signs of staggering.

9. Landry was given the Charter warning at 1:17 pm and the breath demand at 1:22 pm. Landry understood both. He accompanied the officer to the Amherst Police Department.

10. At the Amherst Police Department, Landry was introduced to the breath technician, Cst. Timothy Hunter. He was again read the Charter warning and breath demand.

11. Cst. Hunter administered the breath tests and produced a certificate showing results of 200 mg. per 100 ml. of blood on the first test and 190 mg. per 100 ml. of blood on the second test.

12. Murray returned to the Town Garage and located a bottle of what appeared to be a mixture of water and vodka under the driver's seat.

13. . . . He was charged with failing the breathalyzer and impaired driving.

14. At trial Landry was acquitted of both charges.

[5] It appears that, once placed under arrest for impaired driving, on the evidence of the police officer, Mr. Landry "... did start to stagger more. He seemed to relax and he was staggering more ...". The provincial judge determined that there were no reasonable and probable grounds, when he was placed under arrest, and, therefore, what followed from

the arrest, namely, the certificate would not be admitted and the charges dismissed. In a supplementary brief, Crown counsel submitted:

> The brief period between the arrest and the arrival at the police car, during which the more pronounced symptom of impairment was noted, would therefore, have been acceptable if it had been a detention for a test by an approved screening device, as envisioned by subsection 254 (2) of the Criminal Code.
>
> Had Cst. Murray given a screening demand and asked Mr. Landry to accompany him to his vehicle for that purpose, he could, it is submitted, upon observing grosser signs of impairment than previously, have abandoned the screening demand and moved straight to a breathalyzer demand.
>
> In the present case, Cst. Murray gave Mr. Landry a breathalyzer demand which was in the view of the trial judge without reasonable and probable grounds. Curiously, however, he also said:
>
> > I have no doubt at all that the officer in the circumstances believed this man was probably impaired ...
>
> This can be taken as an implicit (if not explicit) finding that the officer was acting throughout in good faith.
>
> If there was sufficient evidence for a screening test and the officer was acting in good faith then the appellant submits that the first breathalyzer demand can be viewed as premature and the second demand as the operative one.

[6] It is clear the provincial judge found the officer to have acted in good faith and believing he had reasonable and probable grounds to arrest Mr. Landry. However, it is on the basis of an absence of objective grounds that the provincial judge found the arrest improper and denied admissibility of the certificate. It appears the actions of Mr. Landry, following his arrest, may very well have convinced the provincial judge that there were

sufficient grounds. However, his decision was based on the grounds that existed and were known to the officer at the time he initially arrested Mr. Landry. Notwithstanding the submission by Crown counsel that consideration should have been given to the additional observations by the police officer up to the later time when Mr. Landry received the breath demand at the Amherst Police Department, the provincial judge found it was at the time of the initial arrest that the determination must be made as to whether or not there were reasonable and probable grounds.

[7] In his initial brief on this appeal, Crown counsel referred to four authorities with respect to the issue of "reasonable and probable grounds".

> The issue of 'reasonable and probable grounds' is not a new one and has been considered by various Courts of Appeal. The appellant will refer to four cases:
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> R. v. Trask, [1987] N.S.R. No. 365 (N.S.C.A.)
>
> R. v. Babineau, [1981] N.B.J. No. 18 (N.B.C.A.)
>
> R. v. Huddle, [1989] A.J. No. 1061 (ALTA. C.A.)
>
> R. v. Oduneye, [1995] A.J. No. 632

In R. v. Trask, (pp. 4 & 5) MacDonald, J.A., writing for the Court said:

> *The question of belief based on 'reasonable and probable grounds' involves primarily questions of fact. The test is an objective one. As applied to this case it may be expressed as being whether a reasonable man having the means of knowledge available to Cst. Boyd at the time might come to the conclusion that the appellant probably had been driving ... (emphasis added)*

In R. v. Babineau, (p. 3) the New Brunswick Court of Appeal reviewed a number of decisions of other Courts, including two of Judge O'Hearn of the County Court (as it then was) of this Province:

In R. v. Cluney, O'Hearn, Co. Ct. J. said:

... it does not have to be a certainty, or even a belief, that the defendant is more probably impaired than not, but there must be a belief in a substantial probability that the defendant is committing ... a specified offence.

In R. v. Jewers, the same Judge said:

... it must surely be sufficient hat (sic) there are strong objective grounds, although not necessarily conclusive or preponderating to think that the suspect' (sic) ability to drive a motor vehicle is impaired by alcohol or a drug ...

In the Saskatchewan case of R. v. Ridley, Geatros D.C.J. said:

Accordingly, once facts have been established by the Crown on which the peace officer based his belief that the offence was being, or had been committed, then the Court ought to infer that the peace officer's belief was based on reasonable and probable grounds and was well-founded. It is only in instances where the peace officer has not acted in good faith or is actuated by an indirect motive that such an inference should not be made. For instance, if a peace officer stops a motorist and makes a demand without more then he is clearly wrong in thinking that he has reasonable and probable grounds to make a demand. He is not acting in good faith for in such circumstances there are no facts upon which the peace officer could acquire the requisite belief.

The New Brunswick Court concludes its ruling on the point as follows:

I acknowledge that whether or not reasonable and probable grounds exist or not is a question of fact but it is not a question of fact to be determined as such by the trial judge. The trial judge's duty is to ask himself the question whether

facts exist upon which the peace officer could possibly have had reasonable and probable grounds to believe that an offence was being committed, either under s. 234 or 236. In such instances, it is the duty of the trial judge to examine what if any evidence existed upon which the peace officer could possibly have concluded as he did. As long as there is evidence of impairment or consumption of alcohol, i.e. red eyes, unsteadiness, admission of consumption of liquor, that is sufficient evidence upon which a peace officer may acquire reasonable and probable grounds to believe and if he does the trial judge should be satisfied. The test is therefore an objective one, not a subjective one. In this case I agree with Meldrum, J., that the trial judge applied the wrong test or proceeded on the wrong principle as he seemed to have attributed the test of reasonableness and probability according to his own standards rather than to those of the peace officer. (emphasis added)

The Appellant submits that the last comment about the trial judge's application of the test in Trask applies in the present one.

[8] The issue on this appeal is not whether at any time between first encounter of the police officer with Mr. Landry and the administering of the breathalyzer there were reasonable and probable grounds, as this no doubt was the case here. It is whether the arresting officer, at the time of the arrest, must be aware of grounds that are both objectively as well as subjectively reasonable and probable to justify the arrest. In this regard, reference is made to the two remaining authorities cited by Crown counsel in his submission:

In R. v. Huddle, Belzil, J.A., wrote that:

In our view, it is an error in law to test individual pieces of evidence which are offered to establish the existence of reasonable and probable grounds. That is similar to the approach which the Supreme Court of Canada condemned in Morin. True, the smell of alcohol does not show impairment; slurred speech alone does not show impairment by alcohol; glassy eyes may be associated with crying; but the question is whether the total of the evidence offered provided reasonable and proper grounds, on an objective standard. We say that because no issue of subjective belief arises here.

In the case of R. v. Oduneye, the Alberta court of Appeal dealt with a number of issues relevant to a charge of refusal. On the issue of 'reasonable and probable' grounds, the court reviewed a number of cases including Huddle (supra). At paragraph 20, the court ruled as follows:

> *It is clear from these cases that the question of the existence of reasonable and probable grounds must be based on facts known by or available to the peace officer at the time he formed the requisite belief. To paraphrase the statements in the cases cited, does the totality of the evidence available to the peace officer at the time he formed the belief support an objective finding that he had reasonable and probable grounds to believe that the ability of the driver was impaired by alcohol?*

[9] Of particularly note is the observation by the court in *R. v. Oduneye*, *supra*, that the existence of reasonable and probable grounds must be based on facts "known by or available to the peace officer at the time he formed the requisite belief". In *R. v. Oduneye* at paras. 17 and 18, the court referred to the reasons of Kerans D.C.J. in *R. v. Kissen*, [1978] A.J. No. 266, (Alta. D.C.) where the issue was whether evidence of a "failed" reading on an Alert test, without proof of the reliability of functioning of the machine, was sufficient to meet the objective test of reasonable and probable grounds. Judge Kerans, at para. 17, stated:

> The question is whether or not, without more, it can be said that the Crown has established that he acted on reasonable and probable grounds ... It is not necessary that the grounds relied upon by the officer be limited to those matters which are provable in court. It is sufficient that he have belief in grounds that were, in his circumstances on the roadside, reasonable and probable ...

> There have been cases where there is a conviction even though it's been established that he was under a misapprehension of the facts. The test is whether or not what he understood to be the grounds at that time were reasonable and probable grounds. It is, therefore, in a sense subjective because what the court looks to is the state of mind fo the officer, what did he understand the circumstances to be. It's, in a sense, also objective because the court objectively examines the circumstances as understood by the officer. It is not an objective test in the sense that the court looks over the shoulder of the officer to see whether or not the circumstances as understood by them were factual. But, manifestly, the statute intended that the court weigh the grounds that the officer understood to be present; weigh them on the test of reasonableness and probability.

In R. v. Musurichan (1990), 56 C.C.C. (3d) 570 (Alta. C.A.), McClung J.A. stated at 574:

> The important fact is not whether the peace officer's belief, as a predicate of the demand, was accurate or not, it is whether it was reasonable. That it was drawn from hearsay, incomplete sources, or that it contains assumptions, will not result in its legal rejection by resort to facts which emerged later. What must be measured are the facts understood by the peace officer when the belief was formed ...

[10] Clearly, on the authorities, the reasonableness of the grounds are determined on the basis of the peace officer's belief at the time of the arrest and not on the basis of information later learned or observations later made. In this respect, reference is also made to the decision of Justice Kenkel of the Ontario Court of Justice in *R. v. Warford*, [2001] O.J. No. 97 where a police officer had "... stopped a vehicle, investigated the matter, formed the opinion on reasonable and probable grounds that the ability of the accused to drive was impaired due to the consumption of alcohol, and placed the accused under arrest." Another police officer arrived on the scene and, although not

provided with reasons from the first officer, placed the accused under arrest. He stated he formed his opinion on the ability of the accused to operate a motor vehicle following taking of the first breath sample. It was clear that, if the second officer had been informed of the information available to the first officer, there would then have been "reasonable and probable grounds" for the demand. Justice Kenkel held that the taking of the breath samples was without "reasonable and probable grounds" and contrary to law and, although there need only be one proper demand, it was necessary for the samples taken to have been "taken pursuant to a proper demand". The evidence was excluded.

[11] It is clear that at the time of placing Mr. Landry under arrest, the arresting officer must not only subjectively but objectively have information that would constitute reasonable and probable grounds for the arrest. What was subsequently learned cannot make proper what was not so at the time of the arrest itself. The Provincial Court Judge found as much in determining that, although subjectively believing he had reasonable and probable grounds, the police officer did not have sufficient objective indicia to constitute reasonable and probable grounds for the arrest.

[12] In submission, Crown counsel suggests the provincial judge was in error and there were, in fact, reasonable and probable grounds, objectively as well as subjectively, at the time of the arrest. Justice Cromwell of the Nova Scotia Court of Appeal in *R. v. Nickerson* (W.S) (1999), 178 N.S.R. (2d) 189 at p. 191, in respect to the scope of review of a trial court's finding of fact, by a Summary Conviction Appeal Court, at paras. 6 and 7 noted:

> ... Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether ... as stated by the Supreme Court of Canada in **R. v. Burns** (R.H.), [1994] 1 S.C.R. 656 ... the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions.

[13] Similarly, in *R. v. Shrubsall*, (W.C.) (2000), 182 N.S.R. (2d) 351, Justice Bateman on behalf of the court, at para. 9, noted:

> ... In reviewing the finding as to sufficiency of the evidence, the summary conviction appeal court judge is not entitled to retry the case but to determine whether the verdict is unreasonable. This requires the appeal court judge to determine whether the trial judge could reasonably have reached the conclusion that the accused was guilty beyond a reasonable doubt. (citing **R. v. Grosse (P.)** (1996), 91 O.A.C. 40; 107 C.C.C. (3d) 97 (C.A.)) (see also **R. v. Nickerson** (W.S.), [1999] N.S.J. No. 210; 178 N.S.R. (2d) 189; 549 A.P.R. 189 C.A.)) Justice Tidman was clearly aware of the test by which he was to review Judge Curran's decision. He addressed himself to that decision in detail and concluded:
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> > 'A review of the trial transcript and exhibits satisfy me there was sufficient evidence upon which the trial judge could reasonably have concluded that the appellant's conduct constituted criminal harassment

> and that the appellant either knowingly or recklessly harassed the complainant ...'

[14] There was no "error of law" in the Provincial Judge concluding that the sufficiency of the grounds for the arrest were to be determined as of the time of the arrest, and not to be reinforced by information or observations later made by the police officer. In reviewing the evidence, having regard to the scope of review as outlined in the reasons of Justice Cromwell in *R. v. Nickerson*, *supra*, and Justice Bateman in *R. v. Shrubsall*, *supra,* I am satisfied the conclusion that there were no "objective reasonable and probable grounds known to the police officer at the time of the arrest", was not unreasonable.

[15] The appeal is therefore denied.

MacAdam, J.