R. v. *Tricoteux*, 2004 NWTSC 71

Date: 2004 10 6
Docket: CR 2004000040

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

LAURENT TRICOTEUX

Appellant

Appeal from conviction for refusing to comply with a demand for a breath sample, contrary to s.254 C.C.

Heard at Yellowknife, NT: July 22, 2004

Reasons filed: October 6, 2004

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Respondent: David McWhinnie
Counsel for the Appellant: Robert H. Davidson

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REASONS FOR JUDGMENT

[1] The Appellant was convicted in Territorial Court of refusing to comply with a demand for a breath sample, contrary to s.254 C.C. He appeals his conviction, alleging that the trial judge made errors in two specific areas, namely, a) the police officer did not have reasonable and probable grounds to make the demand for a sample, and b) the Appellant was denied his constitutional right to counsel. For the reasons which follow, I find that the Appellant was wrongfully convicted.

[2] Two police officers were involved with the investigation of a drinking and driving charge against the Appellant. One of them, Constable Leckie, was a relatively new police officer. The other, Constable Kosmenko, was a more experienced police officer and, as appears from the trial evidence, gave direction to Constable Leckie throughout the investigation.

[3] The trial evidence indicates that on the evening in question in August 2003, the Appellant was socializing with friends at a downtown restaurant in Yellowknife. He left the restaurant with his friends at about midnight, driving a vehicle from the restaurant parking lot through the streets of Yellowknife towards the south part of the city.

[4] Constable Kosmenko and some other police officers were at the scene of an unrelated investigation in downtown Yellowknife at midnight. Constable Kosmenko's attention was drawn to the Appellant's vehicle. He testified that the vehicle accelerated

heavily towards a stop sign, did not come to a complete stop at the stop sign, and accelerated heavily away from the intersection. He also observed that the vehicle did not have its headlights on. Constable Kosmenko was in civilian clothes, and had not been on regular duty at the time but was called in to assist other police officers with the unrelated investigation.

[5] Upon making his observation of the Appellant's vehicle, Constable Kosmenko instructed Constable Leckie, who was in uniform in a marked police vehicle, to pursue the Appellant's vehicle "and stop it and do a traffic check and to check the status of the driver".

[6] Constable Leckie pursued the Appellant's vehicle, and eventually engaged his emergency lights and siren, and the Appellant stopped his vehicle. When Constable Leckie approached the Appellant's vehicle and requested the Appellant to produce his driver's license, Constable Leckie says the Appellant fumbled through his wallet and initially gave the officer his employee identification card rather than his driver's license. Constable Leckie testified that the Appellant's face appeared flushed, and that the Appellant appeared confused and surprised when Constable Leckie advised him that he had produced his employee identification card rather than his driver's licence. Constable Leckie testified that when he asked the Appellant if he had anything to drink, the Appellant responded that he had had one beer an hour earlier.

[7] Constable Leckie then went back to the police vehicle with the Appellant's driver's license and made inquiries via radio regarding the status of the Appellant's driver's license, any outstanding warrants, etc. Constable Kosmenko arrived at the scene. Constable Kosmenko approached the Appellant in the Appellant's vehicle, spoke to him, and then brought the Appellant back to Constable Leckie's police vehicle.

[8] In the police vehicle, Constable Leckie, at the direction of Constable Kosmenko, advised the Appellant that he was under arrest for impaired driving, advised him of his right to counsel, and read the breathalyzer demand to him, i.e., that he was to accompany Constable Leckie to the police detachment for the purpose of providing a sample of breath for alcohol analysis.

[9] The Appellant was then taken by the two police officers to the detachment. The Appellant was given an opportunity to contact counsel. Attempts were made to contact two different lawyers and Legal Aid at different telephone numbers, but there was no answer at any of the telephone numbers. Although the police officers indicated their willingness to assist the Appellant in continuing to contact a lawyer, the Appellant stated that he was not going to wake a lawyer at 1 a.m., and he was not going to provide a

breath sample without speaking to a lawyer. He was then charged with refusal, in addition to impaired driving.

[10] The trial judge found the Appellant not guilty of impaired driving. In convicting the Appellant of the refusal charge, the trial judge found that the Appellant knew he had the right to counsel, had attempted to contact counsel, and then had decided not to further exercise that right. The trial judge found on the evidence that the Appellant had not been diligent in the exercise of his right to counsel, and that there was no denial of his right to counsel. I see no reason to interfere with these findings of fact.

[11] As stated, the Appellant appeals his conviction on the refusal charge.

[12] The first ground of appeal is stated in the Appellant's Factum thus: "... the learned Trial Judge erred in his determination of whether there existed reasonable and probable grounds required to make a demand pursuant to s.254 (3)(a) of the *Criminal Code*". This ground of appeal is stated in the Notice of Appeal thus: "that the demand was not a valid demand or authorized by s. 254(3)(a) of the *Criminal Code* whereby the Appellant cannot be convicted of refusing or failing to comply". Essentially it is submitted on the Appellant's behalf that if there is no valid demand made by a peace officer under subsection 254(3), there can be no conviction for refusing to comply with such a demand. In arguing this ground of appeal, Appellant's counsel alleges that the trial judge failed to address various inconsistencies in the trial evidence, in particular between the testimonies of the two police officers and also as between the police officers' evidence and that of the defence evidence, including that of the Appellant. In the main, Appellant's counsel's submissions on this ground of appeal amount to a re-arguing of what could constitute reasonable and probable grounds for a peace officer to make the demand under s.254(3).

[13] However, there is a related point which causes me more concern and which in fairness was not drawn to the attention of the trial judge, or only peripherally. During the course of oral argument on this first ground of appeal, Appellant's counsel pointed out that Constable Leckie did not give evidence that he himself had formed the opinion that the Appellant had committed the offence of impaired driving. Indeed, a careful review of the trial transcript reveals that Constable Leckie never was asked if he had formed an opinion regarding the Appellant's ability to drive being impaired by alcohol.

[14] Thus, a prerequisite to a valid demand under subsection 254(3) of the *Criminal Code* is missing:

> 254(3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable
>
> (a) such samples of the person's breath as in the opinion of a qualified technician, or. . .
>
> . . .
>
> (5) Every one commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under this section.
>
> (Emphasis added)

[15] In responding to this specific point during oral argument on the appeal, Crown counsel submitted that there could be no question or doubt that Constable Leckie formed the requisite opinion, even though not questioned on that point, as he had read out the breathalyzer demand from a card. With respect, this misses the point. The point is: was there evidence before the trial judge that Constable Leckie believed on reasonable and probable grounds that the Appellant had committed the offence of impaired driving? There was no such evidence, even inferentially. The evidence of Constable Leckie was that he read the breath demand to the Appellant because Constable Kosmenko instructed him to.

[16] In a prosecution of a refusal charge the Crown must not merely prove that there was a demand for a breath sample but also that it constitutes a demand under s.254(3) C.C. An ordinary interpretation of s.254(3) is that the demand for a breath sample is to be made by a peace officer who is one and the same peace officer who formed a belief on reasonable and probable grounds that the recipient of the demand had committed a s.253 offence (impaired driving or over .08).

[17] Put another way, among the essential elements of a s.254(5) offence that the Crown must prove are the following:

(1) that the demand is made by a peace officer;
(2) that that peace officer believes that an offence under s.253 has been committed (evidence of that belief can be either explicit or by inference);
(3) that the belief contemplated in (2) above is a belief held on reasonable and probable grounds;

(4) that a properly articulated demand was made.

[18] Much of the argument before the trial judge (and on this appeal) related to whether the Crown had proven element (3) above. However, element (2) above was not established by the trial evidence.

[19] There was no evidence that Constable Leckie believed that the Appellant had committed a s.253 offence. Indeed, the evidence is that he was acting on instructions from Constable Kosmenko and that is what led to the demand rather than his own judgment. The law permits his judgment to be based on information he receives from another officer but it has to be his own judgement.

[20] In my respectful view the Crown did not establish at trial a valid demand under s.254(3) of the *Criminal Code.*

[21] Within the legislative regime enacted by Parliament in s.253-258 of the Criminal Code, there are serious consequences for a citizen who complies with, or refuses to comply with, a demand made by a peace officer under s.254(3). Accordingly, in my view the Court must insist on strict compliance with the conditions set forth in the Code.

[22] For these reasons I find that the Appellant has established on this appeal that there was not a valid demand pursuant to s.254(3) C.C. to which the Appellant refused to comply and therefore he cannot be convicted of a s.254(5) refusal offence. I would accordingly grant the appeal and set aside the conviction.

[23] Although it is unnecessary to deal with other grounds of appeal, I will comment on one aspect of the Appellant's complaint of an infringement of his s.10(b) *Charter* rights. While at the detachment and during the time that the Appellant was attempting to contact counsel, Constable Kosmenko stated to the Appellant that "it was not legal for a lawyer to advise him not to provide a sample". This gratuitous advice of Constable Kosmenko was not only inaccurate, it was inappropriate and an improper interference with the Appellant's right to counsel. If it was meant to induce the Appellant to provide a breath sample, it was unsuccessful. If it was meant to induce the Appellant not to further exercise his s.10(b) rights, it was itself a violation of the right to counsel. If it was meant to cause the Appellant to waive his right to counsel, instead it vitiated any such waiver. Crown counsel on this appeal acknowledged that Constable Kosmenko's remark was improper. This impropriety was not fully argued before the trial judge, nor was there any specific finding by the trial judge as to whether or not this improper remark influenced the Appellant in not being diligent in further efforts to contact counsel.

[24] The appeal is allowed, the conviction is set aside.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT
this 6 day of October 2004

Counsel for the Respondent: David McWhinnie
Counsel for the Appellant: Robert H. Davidson

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