

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Fogarty*, 2015 NSCA 6

Date: 20150120

Docket: CAC 420217

Registry: Halifax

Between:

William Lionel Edmund (Byron) Fogarty

Appellant

v.

Her Majesty the Queen

Respondent

Judge:

The Honourable Justice Joel E. Fichaud

Appeal Heard:

December 3, 2014, in Halifax, Nova Scotia

Subject:

Charter of Rights, s. 10(b) – right to re-consult counsel – ss. 254(3.1) and 254(3.4) of *Criminal Code*

Summary:

Mr. Fogarty's vehicle was involved in a fatal collision. The police suspected he was impaired by a drug. The officer demanded that Mr. Fogarty undergo a drug recognition evaluation (DRE) under s. 254(3.1) of the *Criminal Code*. Before the DRE, Mr. Fogarty spoke to counsel. After the DRE, the police demanded that Mr. Fogarty provide a blood sample under s. 254(3.4) of the *Code*. The police did not afford Mr. Fogarty an opportunity to re-consult counsel before the blood was taken. In the Supreme Court of Nova Scotia, Mr. Fogarty was convicted of impaired driving causing death and dangerous driving causing death. Mr. Fogarty appealed his convictions to the Court of Appeal.

Issue:

Did the failure to provide Mr. Fogarty the opportunity to re-consult counsel, before the blood sampling, violate his rights under s. 10(b) of the *Charter* and, if so, is the blood evidence

inadmissible under s. 24(2) of the *Charter*?

Result:

The Court of Appeal dismissed the appeal. On this record, the trial judge was entitled to assume that Mr. Fogarty received competent legal advice before the DRE. The wording of ss. 254(3.1) and 254(3.4) makes it clear that the DRE may culminate in a fluids demand. During the pre-DRE consultation, competent counsel would expect that a failed DRE likely would trigger a demand for bodily fluids under s. 254(3.4), and would advise the client respecting that eventuality. The trial judge neither erred in law nor committed a palpable and overriding error of fact.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 16 pages.