NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Schofield*, 2017 NSCA 30

Date: 20170412
Docket: CAC 445688
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Aaron Troy Schofield

Respondent

Judges:	Bourgeois, Hamilton and Van den Eynden, JJ.A.
Appeal Heard:	February 9, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Hamilton, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring
Counsel:	Mark Scott, Q.C., for the appellant Philip Star, Q.C., for the respondent

Reasons for judgment:

[1] Aaron Troy Schofield was charged on May 13, 2011 with operating a motor vehicle (1) while impaired contrary to s. 253(1)(a) of the *Criminal Code*, (2) while his blood alcohol exceeded the legal limit contrary to s. 253(1)(b) and (3) while disqualified by order, contrary to s. 259(4)(a). He has had two trials.

[2] The issue in this appeal is whether the trial judge in the second trial erred in disregarding the Certificate of Analysis ("Certificate"), showing 220 mg and 200 mg of alcohol in Mr. Schofield's blood, on the basis Mr. Schofield did not receive a copy of the Certificate and reasonable notice of the Crown's intention to produce it at his trial as required by s. 258(7) of the *Criminal Code*.

[3] For the reasons that follow, I am satisfied the trial judge erred by failing to consider all of the relevant evidence in relation to the issue before him. I would allow the appeal, enter a conviction and refer the matter to the trial judge for sentencing.

Background

[4] The trial judge who conducted Mr. Schofield's second trial in 2015, and whose decision in under appeal, describes in his unreported oral reasons the testimony of the arresting officer, Cst. Kenneth Cook, as to what happened after he stopped Mr. Schofield and took him to the RCMP Detachment in Bridgetown where breath samples were taken by another officer:

> The trial evidence here establishes that shortly before taking Mr. Schofield from the RCMP Detachment in Bridgetown to the RCMP Lockup in Kingston, the arresting officer, Constable Cook, gave Mr. Schofield a copy of the Certificate and Notice of Intention to introduce it at trial. The drive to Kingston occurred shortly after midnight. Upon arrival at the Lockup, Mr. Schofield was lodged in a cell with none of his possessions other than his socks, shirt, and pants. And I should have said it occurred around midnight rather than shortly after, because it began just before.
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> Constable Cook left the Lockup a few minutes later and had no further dealings with Mr. Schofield that day. He was not present when Mr. Schofield was released from the Lockup. No one else was called by the Crown to testify whether the Certificate and Notice were returned to Mr. Schofield before he left.
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> … If I didn't already say it, I point out that during the drive from Bridgetown to Kingston, although it appears that Mr. Schofield had the Certificate, this was all at

> night and in the dark and, obviously, he would not have had any opportunity to consider or reflect on the Certificate during that time.

[5] Prior to his first trial, Mr. Schofield made an application for the exclusion of all evidence obtained by the RCMP subsequent to the breathalyzer demand, including the Certificate and the Notice of Intention to Produce ("Notice"). Both were contained on a single page document. He alleged that his rights under s. 8 of the *Charter of Rights and Freedoms* were violated because Cst. Cook did not have the reasonable grounds necessary to make the demand under s. 254(3) of the *Code*.

[6] A blended *voir dire*/first trial was held on November 22 and December 13, 2013. The Certificate and Notice were entered as exhibit VD/T-2 during the *voir dire*.

[7] The judge (different from the judge now under appeal) who conducted the *voir dire*/first trial found Cst. Cook had no reasonable grounds to make the demand for a breath sample under s. 254(3) of the *Criminal Code*; that s. 8 of the *Charter* had been breached and that the Certificate should be excluded under s. 24(2) of the *Charter*. In the absence of other evidence, the judge acquitted Mr. Schofield of the s. 253(1)(a) (impaired driving) and (b) (over "80") charges and convicted him of driving while prohibited.

[8] The Crown successfully appealed the acquittals under s. 253(1)(a) and (b) to this Court on the basis Cst. Cook had reasonable grounds to make the demand (*R. v. Schofield*, 2015 NSCA 5). As such, there was no breach of s. 8 of the *Charter*. There was no cross appeal by Mr. Schofield of his conviction of driving while prohibited. A new trial was ordered on the s. 253(1)(a) and (b) charges.

[9] The second trial was held before Judge Patrick H. Curran on September 8, 2015. The Crown presented its case by calling Cst. Cook and introducing the Certificate and Notice as an exhibit. It is clear it was the same Certificate and Notice entered as an exhibit at the *voir dire*/first trial two years earlier, as the exhibit stamp from the *voir dire* was on it. When it was introduced, defence counsel did not object to the Certificate and Notice being entered as an exhibit at Mr. Schofield's second trial. At the end of its case, the Crown tendered and closed its case. The defence called no evidence.

[10] For the first time, following the Crown's final submissions, defence counsel argued that the Certificate was not admissible as the Crown had not, before trial, given Mr. Schofield a copy of the Certificate and reasonable notice of its intention

to produce the Certificate as required by s. 258(7). He argued that giving the Certificate and Notice to Mr. Schofield at around 11:51 p.m. on the date of the offence, and taking it away from him when he was put in cells at 12:17 a.m., with the intervening time spent in the back of a police car in the dark, and no proof that the Certificate and Notice was returned to Mr. Schofield when he was released from cells, did not provide Mr. Schofield with the reasonable notice required by s. 258(7).

[11] The Crown indicated he was taken by surprise by the defence argument. He asked for, and was given, time to respond to the defence argument. He did not request an opportunity to reopen the Crown's case to provide additional evidence concerning the respondent's blood alcohol level, although he indicated such evidence was available.

[12] In his subsequent written brief, the Crown referred to the case of *R. v. Demers*, 2007 SKQB 348, to support his argument that the fact the Certificate and Notice were an exhibit at an earlier hearing was sufficient compliance with s. 258(7).

[13] On October 26, 2015, after receipt of the parties' written submissions, the trial judge gave his short decision in which he distinguished *Demers* on the basis that unlike, in that case, it was not proved at the prior hearing that the Certificate and Notice had been properly served on Mr. Schofield.

[14] The trial judge never considered whether the role played by the Certificate and Notice in Mr. Schofield's previous application for exclusion of evidence and in the *voir dire*/first trial, in and of itself, amounted to sufficient compliance with s. 258(7). Instead, in reaching his decision that s. 258(7) had not been complied with, he only considered whether the events on the night of Mr. Schofield's arrest satisfied the requirements of that section. He accepted the defence argument that they did not and acquitted Mr. Schofield of both charges.

[15] The Crown now appeals only Mr. Schofield's acquittal under s. 253(1)(b), driving while his blood alcohol exceeded the legal limit.

Issues

[16] There are only two issues that need to be dealt with to resolve this appeal:

1. Did the trial judge err in finding the requirements of s. 258(7) were not met?

2. If so, should a conviction be entered or a new trial ordered?

Standard of Review

[17] Section 676(1)(a) of the *Criminal Code* permits an appeal from an acquittal on a question of law. The determination of whether a copy of the Certificate and reasonable notice was given pursuant to s. 258(7) is a question of mixed fact and law, *R. v. Redford*, 2014 ABCA 336, paras. 12, 38; *R. v. Shaw* (1996), 154 N.S.R. (2d) 265, paras. 15, 16. However, there is no dispute on the facts in this appeal. The issue before us is whether the judge failed to consider all of the relevant evidence. A trial judge's failure to consider all of the evidence in relation to an issue before him or her is an error of law, *R. v H. (J.M.)*, 2011 SCC 45, paras. 31, 32. The standard of review is correctness.

Analysis

[18] As indicated in paragraphs 13 and 14 above, the trial judge distinguished *Demers*. He did not consider whether, on the facts of this case, the prior defence application to exclude the Certificate and Notice from the first trial and its introduction as an exhibit at the *voir dire* met the requirements of s. 258(7).

[19] In *Demers*, the certificate of analysis was entered as an exhibit and relied on at the accused's first trial to convict him under s. 253(b) (over "80"). His conviction was overturned on appeal. At his second trial, the accused was acquitted when the certificate was found inadmissible for non-compliance with s. 258(7), as the officer who served the accused with a copy of the certificate testified that he did not compare the original certificate with the copies served on the accused. The Crown successfully appealed his acquittal.

[20] The appeal court held:

> [17] Although the trial judge accepted that it was uncertain whether a true copy of the notice of intention and Certificate of Analysis had been served upon the accused at the time of his release from custody, it is also clear that the accused, in fact, received the copy of the Certificate of Analysis and notice of intention at the first trial as that document was entered into evidence in convicting the accused.
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> [18] At the start of the second trial, the accused therefore had received a copy of the Certificate of Analysis and notice of intention required under s. 258(7). The fact that the notice received had not been served properly by the peace officer at the time of the accused's release from custody does not mean that service under s. 258(7) has not been accomplished.

> [19] The "procedural game" has clearly been satisfied by the Crown in that the accused knows the case he has to meet. The reference in s. 258(7) to the intention to produce before trial must mean the trial that the accused is currently facing, and in the second trial the accused clearly has that information.

[21] While the trial judge was not bound to follow *Demers*, he was required to consider all of the evidence, including the fact that in 2013 defence counsel made the s. 8 *Charter* application to exclude this very Certificate and Notice and participated in the resulting *voir dire*/first trial where the same Certificate and Notice relied on by the Crown at the second trial was entered as an exhibit.

[22] He erred by failing to do this.

[23] To determine if the trial judge's error is a reversible one, we must consider all of the undisputed facts and the relevant principles of law to determine if Mr. Schofield received a copy of the Certificate and reasonable notice that it would be introduced by the Crown at his second trial.

[24] The facts indicate that Mr. Schofield's counsel knew the contents of the Certificate and that it was the Crown's intention to produce it at Mr. Schofield's first trial in 2013. That is why he applied for its exclusion. He then participated in the *voir dire*/first trial where the same Certificate and Notice that was entered as an exhibit at the second trial was marked as an exhibit at the *voir dire*.

[25] As both parties agree, notice to Mr. Schofield's counsel is notice to him; *R. v. Dillabough*, 2013 SKPC 141, para. 23; *R. v. Meyer* (1973), 29 CCC (2d) 165 (BCCA); *R. v. Oslowski*, 2006 ONCJ 488; *Demers*, para. 14.

[26] Section 258(7) does not specify that a copy of a certificate of analysis be given to an accused in any particular manner. It only specifies that the notice be reasonable:

> (7) No certificate shall be received in evidence pursuant to paragraph (1)(e), (f), (g), (h) or (i) unless the party intending to produce it has, before the trial, given to the other party reasonable notice of his intention and a copy of the certificate.

[27] The notice requirement is procedural and does not require any particular form or method; it need not be formal in any way; *Dillabough*, para. 11; *R. v. Bourque* (1991), 66 CCC (3d) 548 (NSCA), para. 43; *Demers*, para. 13.

[28] In *R. v. Oslowski*, 2006 ONCJ 488 (CanLII), it states:

> [33] Further, there is a consistent line of authority holding that, where no notice at all has been given, the tendering of a certificate at a preliminary inquiry provides sufficient compliance with the notice requirement: *R. v. Kwok* (2002), 2002 BCCA 177 (CanLII), 164 CCC (3d) 182 (BCCA); *R. v. Chang* (1996), 102 CCC (3d) 87 (BCCA); *R. v. Norris* (1993), 1993 CanLII 681 (BC CA), 57 W.A.C. 133 (BCCA); *R. v. Penno*, supra; *R. v. Cordes* (1978), 40 CCC (2d) 442 (Alta. C.A.) and most recently *R. v. Dillon*, [2005] O.J. No. 2516 Hill J. Since no notice per se was given in any of those cases, it is apparent that those cases have interpreted the section as meaning "put on notice". In other words, nothing, written or verbal has to be specifically "given".

[29] The purpose of s. 258(7) is to ensure the accused knows the case s/he has to meet and is in a position to properly prepare his/her defence; *R. v. Morrison* (1982), 42 NBR (2d) 271 (CA), para. 29; *Redford*, para. 35; *R. v. Banks*, [1972] WLR 346 (CA), page 352; *R. v. Garson* (1982), 15 MVR 147 (Sask QB), para. 7.

[30] Hill, J., in *R. v. Dillon*, [2005] O.J. No. 2516, reviewed the approach taken by courts to notice and expands on the purposes of the notice provisions:

> [10] No particular form of notice is required: *R. v. Gazica* (2002), 2002 ABCA 217 (CanLII), 168 C.C.C. (3d) 446 (Alta. C.A.), at p. 448. In the experience of the court, a written notice is generally provided to an accused communicating the prosecution's intention to adduce certificate evidence at trial. This amounts to formal or express notice. Where, however, as in s. 461 of the *Code*, written notice is not statutorily required, a notice respecting certificate evidence need not be in writing: *R. v. Bowles, supra*, at pp. 431-2.
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> [11] In *R. v. Morrison* (1982), 70 C.C.C. (2d) 193 (N.B.C.A.), at p.197, La Forest J.A. (as he then was) observed:
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> > The utility of the section in simplifying the production of evidence and thereby reducing the time and cost of criminal prosecutions ought not to be diluted by an insistence on perfection. The essential question is whether the notice was reasonable under the circumstances of the particular case. What is required is that it clearly and precisely brings home to the accused that the certificate will be used in relation to the particular offence with which the accused is charged under the *Act*.
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> In adopting this passage from *Morrison*, the court, in *R. v. McCullagh* (1990), 53 C.C.C. (3d) 130 (Ont. C.A.), at p.136, also approved the statement in *R. v. Good* et al. at p.107 that: "Appellate courts have consistently, and rightly, refused to invalidate notices on mere technical objection that the procedure left something to be desired."
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> [12] The reasonableness of notice respecting certificate evidence must be assessed in light of the purposes of such notice including:

> (1) to enable the accused person to know precisely the nature of the case against him or her thereby providing an adequate opportunity to make full answer and defence: *R. v. Tam*, [2000] O.J. No. 2185 (QL) (C.A.), at para. 17
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> (2) "the notice must be precise and accurate and reasonably certain so that an accused person is alerted with certainty as to the procedure to be invoked": *R. v. Henri* (1972), 9 C.C.C. (2d) 52 (B.C.C.A.), at p. 56; *R. v. Cordes* (1978), 40 C.C.C. (2d) 442 (Alta. C.A.), at p.449 (affirmed (1979), 1979 CanLII 206 (SCC), 47 C.C.C. (2d) 46 (S.C.C.))
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> (3) to permit adequate deliberation time as to whether an application to the court ought to be made for an order requiring attendance of the analyst or certificate for the purpose of cross-examination
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> (4) "simplifying the production of evidence": *R. v. Morrison, supra*, at p. 197
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> (5) "reducing the time and cost of criminal prosecutions": *R. v. Morrison*, at p.197; *R. v. Bowles*, at pp. 431, 435.

[31] A second notice is not required for a second trial; *R. v. Nickerson*, [1984] N.S.J. No. 394 (NSCA).

[32] Mr. Schofield appropriately concedes that he was not caught off guard when the Certificate and Notice were tendered at his second trial.

[33] The undisputed facts indicating Mr. Schofield's counsel's knowledge in 2013 of the same Certificate and Notice that was entered as an exhibit at Mr. Schofield's second trial and the principles of law referred to above are: that notice to his counsel is notice to Mr. Schofield; that no particular method of giving notice under s. 258(7) is required; that the tendering of a certificate at a preliminary inquiry meets the notice requirements; that the purpose of notice was to ensure Mr. Schofield knew the case he had to meet and was in a position to properly prepare his defence; that a second notice is not required for a second trial and that there was no prejudice to Mr. Schofield. Given these facts, I am satisfied the trial judge made a reversible error when he found the requirements of s. 258(7) were not met and went on to disregard the Certificate.

[34] Mr. Schofield, again, rightfully concedes that if the judge erred in not considering the Certificate, there was no further evidence required for a conviction. The Certificate was dispositive of the outcome on the facts of this case and would have resulted in a conviction.

[35] Accordingly, I would set aside the acquittal, substitute a conviction for the "over 80" count and remit the matter to the Provincial Court for the purpose of sentencing.

Hamilton, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.