Cite as: R. v. Weir, 1992 NSCO 17

1991 C.AR. No. 02632

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

LLOYD MURRAY WEIR

RESPONDENT

HEARD: By written submissions

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

CHARGE: Section 254(5)(a) of the Criminal Code

DECISION: The 20th day of January, A.D. 1992

COUNSEL: David E. Acker, Esq., for the Appellant

C. Hanson Dowell, Esq., Q.C., for the Respondent

D E C I S I O N O N A P P E A L

HALIBURTON, J.C.C.

This is an Appeal by the Crown from the acquittal of Lloyd Murray Weir. Mr. Weir was charged that at or near Middleton on or about the 19th day of October, 1990, he did

> without reasonable excuse refuse to comply with a demand...to provide..samples of his breath...in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5)(a) of the Criminal Code.

The matter proceeded in the Provincial Court before John R. Nichols, J.P.C., on May 14th, 1991. After reserving to consider the arguments of Counsel, Judge Nichols dismissed the charge, saying:

> I am prepared to acquit your client based on (the) Lewis decision.

Judge Nichols was referring to Her Majesty The Queen v. Robert Thomas Lewis, No. C.C. 891535, Vancouver Registry, of the British Columbia County Court. The case was decided by Mr. Justice D. T. Wetmore and filed August 14th, 1990.

In general terms, there is one issue only on this appeal and that is whether the Accused had a **"reasonable excuse"** for his failure. Section 254 of the Code provides that upon certain conditions being met, a peace officer

> **254(3)**...may, by demand made to that person...,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
>
> (b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,

> (i) the person may be incapable of providing a sample of his breath, or
> (ii) it would be impracticable to obtain a sample of his breath, such samples of the person's blood...as...
> are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood...

It is not clear from the materials before me whether Judge Nichols had before him at the time of making his decision the decision rendered by Mr. Justice Misener in R. v. Richardson (1991), O.J. No. 695 (apparently unpublished). I find the reasoning of Misener, J. compelling and applicable to the case before me. In setting out the issue in that case, Misener, J. said:

> In the strict sense, the issue in this appeal is whether Judge Phillips was entitled to hold that the excuse that Mr. Richardson asserted was, in law, a reasonable one in the circumstances. I think I state the issue more accurately, however, when I say that the issue is **whether R. v. Lewis,** a judgment of Wetmore J. of the Supreme Court of British Columbia, **was correctly decided, and therefore whether a bona fide offer of a blood sample made in circumstances where blood samples can be easily obtained within the two-hour limit, is, without more, a reasonable excuse for refusing to comply with a demand to supply breath samples.**
> (Emphasis added)

THE FACTS

A brief review of the facts of this case would, perhaps, be helpful.

The Accused, being the operator of a motor vehicle, was apprehended at approximately 12:45 a.m. The vehicle he was operating was a van belonging to one of the other occupants.

The occupants were returning to Nictaux after an evening spent in a cocktail lounge in Middleton. Middleton is a small Town and Nictaux, an adjoining community.

Because there was some difficulty with having the vehicle towed from the site or finding an alternative operator, one of the policemen involved drove the van with its owner and the Accused to their destination. This was accomplished and the Accused was returned to the police office at approximately 1:15 a.m.

On returning to the police office, Weir reiterated his refusal to take a breathalyzer test. The evidence of the police constable in relation to this is found at page 14 of the transcript:

> QUESTION: Do you recall in what way he refused?
>
> (Line 30)
> ANSWER: That problem was that he had a medical reason for that which was a fractured skull years ago and as a result of that he was unable to blow into the instrument.
>
> (And page 15)
> QUESTION: ...Now did he made any other request of you at all in relation to this breathalizer test?
>
> (Line 15)
> ANSWER: Excuse me, my apology, he did make a request, as a result of reading the demand and indicating that he had a problem with blowing into the instrument he did indicate that he would wish to go to the hospital and take a blood test instead of blowing into the instrument.
>
> QUESTION: After you arrived back at your office and made the comment he didn't want to speak to counsel, was anything further said about his fractured skull or about offering blood samples do you recall?
>
> ANSWER: Well in the police vehicle I said to Mr. Weir that he had more physical reasons for him not to blow

into the instrument. I observed Mr. Weir walking and he showed no indication of having any problem breathing. As a result of (inaudible...) he never really had any problem with his breathing as well.

QUESTION: Can I ask you any particular reason why you didn't take him to the hospital for a blood test?

ANSWER: Generally I had reasonable grounds to believe that he was impaired by alcohol and that those grounds, without blowing into the instrument I couldn't determine that he had a problem.

(Line 14)
QUESTION:...he was asking for blood samples any reason why you didn't take him up on that?

ANSWER: He refused the demand and we just left it with the refusal.

(Line 28)
QUESTION: Alright. Now when you indicated that he refused, did he give reason for his refusal at that time?

ANSWER: The same reason was that he had a fractured skull and that he couldn't blow into the instrument.

QUESTION: Alright and again from any observations you made of him walking, having dealings with him, speaking to him did you note anything to substantiate that he may have a problem providing samples?

ANSWER: None.

On cross-examination, it was elicited from the police constable that the local hospital was less than one-half mile distant from the police office and that the police constable had made no effort to determine whether a doctor might be available there for the purpose of taking the blood sample which the Accused had offered to give.

The Accused himself, in giving evidence, testified that he had had three beers during the evening and was with his friends. Because of the condition of his friend, the owner of the van, "I said I'd better drive".

(Page 23, Line 33)
QUESTION: Now you were asked to take a breathalizer?

ANSWER: Yes. I said to him after we got back to the police station I said I got a fractured skull and I can't take it and I said take me down to the hospital I said it two or three times...I asked for a blood sample. I said it two or three times.

(Page 24, Line 23)
QUESTION BY THE COURT: When did you fracture your skull or how do you know you can't take the breathalizer?

ANSWER: Even when I wear a cap across my forehead it bothers me I have to wear it on the back of my head.

QUESTION: What does that have to do with blowing into a machine?

ANSWER: Well there's still a fracture.

QUESTION: How long ago did you have the fracture?

ANSWER: Ever since I was 11 years old.

(There is no evidence as to the age of the Accused, however, the evidence seems to indicate that he has been occupied as a meat cutter for a period in excess of 14 years. It would seem to have been at least that long since he was aged 11.)

The reading of the transcript makes it clear that the Trial Judge accepted the proposition advanced by Defence Counsel that "The man sincerely, honestly believed that he couldn't take the test". However, the transcript also includes the evidence of the Accused that he has not, in his lifetime, attempted to blow in either a breathalizer or ALERT machine.

THE BELIEF OF THE ACCUSED

The bona fides of the belief held by the Accused is a question of fact to be determined by the Trial Judge. In the absence of a bona fide belief in some facts which prevented his blowing into the machine, there could not be a reasonable excuse. I merely express my own doubt after a review of the transcript as to whether there may have been evidence upon which the Trial Judge could have reached the conclusion that Weir, in fact, had such a bona fide belief. The evidence consists of nothing more than the fact that he testified he had suffered a skull fracture at age 11, and that it bothers him to wear a hat in a certain position. There is no evidence as to how that injury would either prevent him from blowing or would create a risk to his health if he did attempt to blow. Counsel have produced a number of cases in relation to reasonable excuse where a variety of factual circumstances were advanced. The case before the Court here is

- not one of those cases where the Accused tried and failed to blow;
- not one of those cases where there is evidence of a condition which objectively could have prevented him or made him unable to blow or which would have apparently caused him to suffer any damage by blowing;
- not one of those cases where the Accused had some overcoming and urgent requirement to be elsewhere;
- not one of those cases where the investigating police officer either demanded a blood sample in the alternative or accepted the proposition that the Accused might be permitted to give such a sample in the alternative.

APPLYING R. v. RICHARDSON

Even if the Accused brings himself within the parameters of the Lewis case by establishing that his offer to provide blood samples was a bona fide one, I find the law to be that enunciated in the Richardson case. The conclusions reached in that case are in accord with the decision of the Saskatchewan Court of Appeal in R. v. Wall (1974) 19 C.C.C (2d) 146. Notwithstanding the views expressed by Wetmore, J., with respect to the changes in the Criminal Code which have taken place since the decision was rendered in R. v. Wall, the comments of Culliton, C.J.S., at pages 148 and 149 of Wall remain as valid today as they were in 1974. He said:

> The language of s. 235 is clear and unambiguous. It provides for the right under certain conditions of a peace officer to demand from a person a sample of that person's breath. The section further provides that the person to whom the demand is made in accordance with S-S. (1) commits an offence if he or she fails or refuses to comply with the demand in the absence of a reasonable excuse for such failure or refusal.

Culliton, C.J.S. goes on to say that the priority of the demand is established and that the respondent will therefore be guilty unless he can establish a "reasonable excuse" for his refusal. Mr. Justice Culliton was of the opinion that the offer to give a blood sample was not a reasonable excuse, as he says:

> The conclusion that such an offer is a reasonable excuse for failing to comply with a proper demand for a sample of breath finds no support either in the language of the section or in any logical interpretation of that language. **For the Court to so conclude not only defeats the intent and purpose of the enactment, but is, as well, the virtual exercise of a legislative power which it does not possess. Moreover,**

> **such an interpretation would enable a person to render inoperative the probative provisions of s. 237 by simply refusing to supply a breath sample and by offering a blood sample in place thereof. This the Court should not permit.**
>
> (My emphasis.)

The present section is essentially no different from the Code section which was considered in R. v. Wall. Section 254(3) provides that the peace officer can, upon establishing certain criteria, demand a breath test and, further, that where he, the peace officer, has **reasonable and probable grounds** for believing certain other things, he may make a demand for a sample of blood upon certain conditions. To interpret the section as the Defence seeks to have it interpreted here would virtually negate the Legislation. It would give a choice to the recipient of a breath demand as to whether he will give a breath sample or a blood sample. In doing so, it would remove that discretion from the peace officer, in whom the Legislature saw fit to vest the choice.

The breathalyzer provisions were legislated in response to an extreme social ill. Their purpose is to permit the detection and conviction of impaired drivers so as to reduce the risk of motor vehicle accidents and the resultant injuries arising from drinking and driving. The price to be paid by society as a whole, is a restriction on the general proposition that no one will be obliged to give evidence against themselves. It is presumably because of this serious erosion of what is a basic evidentiary right in our traditional law that the Legislature provided that an accused might escape the consequences of a "failure or a refusal" by establishing a reasonable excuse as provided in s. 254(5). It is well established that any "excuse" which amounts to an attack on the

legislative scheme is not a "reasonable" one. There is scant evidence, if any, in the facts of this case to support any thesis that Weir was physically incapable of blowing, that he would have suffered any pain by blowing, or that doing so would have endangered his health. The evidence is not persuasive that he was genuine in his offer to permit blood tests. Judge Nichols, having failed to give reasons other than to say that he was following the decision in R. v. Lewis, leads me to conclude in the circumstances that he considered, as did Mr. Justice Wetmore, that the offer of a blood sample, in itself, constituted a reasonable excuse for his refusal to provide a breath sample. Such a proposition is an attack on the legislative scheme and is not and cannot be accepted as a reasonable excuse.

DATED at Digby, Nova Scotia, this 20th day of January, A.D. 1992.

CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

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CASES AND STATUTES CITED:

Her Majesty The Queen v. Robert Thomas Lewis, No. C.C. 891535, Vancouver Registry

R. v. Richardson (1991), O.J. No. 695

R. v. Wall (1974) 19 C.C.C. (2d) 146

C A N A D A
PROVINCE OF NOVA SCOTIA 192279

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT
OF DISTRICT NUMBER THREE

ON APPEAL FROM

THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

-versus-

LLOYD MURRAY WEIR

HEARD BEFORE:	His Honour Judge John R. Nichols, J.P.C.
PLACE HEARD:	Annapolis Royal, Nova Scotia
DATES HEARD:	May 14 and July 17, 1991
CHARGE:	That he at or near Middleton in the County of Annapolis, Nova Scotia, on or about the 19th day of October, 1990, did without reasonable excuse refuse to comply with a demand made to him by Timothy James Carrigan, a peace officer to provide then or as soon thereafter was was practicable 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)(a) of the Criminal Code.
COUNSEL:	David E. Acker, Esq., for the Prosecution C. Hanson Dowell, Esq., Q.C., for the Defence

C A S E O N A P P E A L