IN THE PROVINCIAL COURT
Citation: R. v. Boudreau, 2004 NSPC 32

Date: 20040112
Docket: 1262831
Registry: Amherst

Between:

Her Majesty the Queen

versus

Dennis Darrell Boudreau

DECISION
(Sentence)

Heard Before:	The Honourable Judge Carole A. Beaton
Place Heard:	Amherst, Nova Scotia
Date Heard:	January 12, 2004
Written Release of Oral Decision:	March 1, 2004
Counsel:	Mr. Doug Lloy, Crown Attorney Mr. Rob Gregan, Defence Attorney

BEATON, J.P.C., orally:

[1] Mr. Boudreau is charged with two offences alleged to have occurred on November 29th, 2002; namely an offence contrary to section 253(b) and an offence contrary to section 253(a).

[2] I will say, at the outset, that the burden in this matter rests with the crown to prove all of the elements of the offence beyond a reasonable doubt. In this case that would be the elements of the offence contrary to section 253(b) and the offence contrary to section 253(a). The presumption of innocence attaches to Mr. Boudreau and remains with him until the trial has been completed and until all of the evidence has been assessed by me.

[3] I am satisfied, and I don't think there is any particular dispute asserted by the defence, and I am certainly satisfied based upon all the evidence I've heard that the offences, if they occurred, did indeed occur on November 29th, 2002 at Amherst, Nova Scotia. So, on the jurisdictional issues, I am satisfied beyond a reasonable doubt.

[4] I have gleaned from all of the evidence and I accept as a fact, and again there does not appear to be any dispute, that Mr. Boudreau was the individual

involved that day in a motor vehicle accident at the intersection of East Pleasant and Church Street in Amherst, Cumberland County, Nova Scotia.

[5] I find as a fact that Ms. Tammy Dwyer was the operator of a vehicle which was travelling in front of Mr. Boudreau on the day in question and her friend, Terry Lynn Myles, was a passenger. Both of those parties gave evidence today and both of them described their contact with Mr. Boudreau.

[6] I find as a fact that Constable Reid attended at the scene of the accident and after several minutes he was assisted by Sergeant MacPherson.

[7] If ind as a fact that officer Reid, after formulating the reasonable and probable grounds to believe that Mr. Boudreau was under the influence of alcohol or a drug, provided to Mr. Boudreau a series of standard warnings and cautions and also made a breath demand requiring that Mr. Boudreau submit a sample of his breath suitable for analysis and I will have more to say later about the indicia of impairment that Constable Reid observed.

[8] I find as a fact that Constable Reid, after learning that Mr. Boudreau was complaining of chest pains and after observing that Mr. Boudreau had a laceration to the forehead, then made a determination to administer a blood sample demand to Mr. Boudreau requesting a sample of Mr. Boudreau's blood suitable for further analysis.

[9] I also find as a fact that Constable Reid accompanied Mr. Boudreau to the Cumberland Regional Health Care Centre and once there Constable Reid and Mr. Boudreau were joined by Sergeant MacPherson and Mr. Boudreau was examined by Dr. Porwal and subsequently Dr. Porwal, assisted by Constable Reid and Sergeant MacPherson, extracted the blood samples from Mr. Boudreau.

[10] I also find as a fact that those same blood samples which were deposited into the vacutainer, that container being one of the items which forms the subject of part of the defence argument today. That same vacutainer was forwarded to the Forensic Lab in Halifax whereupon an analysis was made by Lori Campbell.

[11] I find it a fact that Lori Campbell, who was earlier today a person who gave evidence as an expert witness, did indeed conduct certain analyses of the blood samples of Mr. Boudreau, and I will have more to say about that later as well.

[12] The evidence of Ms. Dwyer was that during a portion of the time that she was with Mr. Boudreau, that being the time that Mr. Boudreau spent at her window, was a time in which she could detect the smell of alcohol coming from Mr. Boudreau. Ms. Dwyer gave a detailed explanation during the

course of both her direct and cross-examination about her ability to observe Mr. Boudreau, subject to the fact that she was experiencing difficulty and pain as a result of what later turned out to be a whiplash injury. Ms. Dwyer described how she had difficulty understanding Mr. Boudreau. She described that Mr. Boudreau was by times mumbling to her and he was discussing the fact that he had to go retrieve his children from school. I am satisfied, based on her evidence, and I find it a fact that indeed Mr. Boudreau did demonstrate or display to Ms. Dwyer some indicia of impairment, being that he had a smell of alcohol emanating from his breath and that he by times exhibited a mumbled stye of speech. I note that Ms. Dwyer, by her own evidence, was approximately three to four inches from Mr. Boudreau when this contact occurred.

[13] The evidence of Ms. Dwyer's passenger, Tracy Lynn Myles, was that she was two feet from Mr. Boudreau and she did not detect any odour from Mr. Boudreau. However, she noted that she had great difficulty understanding Mr. Boudreau. She found it difficult to understand what he was saying. She found it difficult to understand what he was trying to communicate and I find as a fact and I am satisfied that Ms. Myles did note one of what could be

considered as an indicia of impairment, being the mumbled speech and the nonsensical speech of Mr. Boudreau.

[14] The evidence of Mrs. Brenda Black was that at approximately 12:15, which I am satisfied was approximately ten to fifteen minutes before the motor vehicle accident occurred, Mrs. Black had contact with Mr. Boudreau at her home, then on Albion Street in Amherst. She expressed that she was surprised to see Mr. Boudreau's car in her yard and she wondered why he was there. She went to the door. Mrs. Black went on to describe in her evidence in direct and cross-examination as to the opinion that she formed and the observations that she made of Mr. Boudreau. I am satisfied and find as a fact that Mrs. Black noted that Mr. Boudreau had emanating from his breath a strong smell of alcohol. He had difficulty communicating with Mrs. Black and in particular he did not appear to be oriented as to the time. He did not appear to understand why his children would not be at Mrs. Black's home at that time of day.

[15] I am also satisfied and find as a fact that Mr. Boudreau had great difficulty navigating his vehicle away from the Black home and back onto the street to the point where Mrs. Black, having observed Mr. Boudreau's difficulties, then contacted the police because she was very concerned that Mr. Boudreau

was going to cause an accident with a child. In fact, Mrs. Black described in detail how Mr. Boudreau at one point was out in the middle of the street in his car and his car was not moving, it was stationary and people were blowing their horns because Mr. Boudreau was located in the middle of the intersection.

[16] Dealing first with the breathalyzer count, there are a number of issue which have been raised by counsel, which I will address, not necessarily in the order in which they were presented to me in submissions, but hopefully my logic will become clear.

[17] The first issue is whether the vessel into which the blood samples were received was an approved container. The defence challenges that the container was not an approved container on the basis that the container which Ms. Campbell received from Constable Reid was a container that was marked with one series of trademark symbols which were different from the trademark symbols described in the definition of an approved container. Ms. Campbell's evidence was that the vacutainer label which contained the blood sample, which she analyzed, was marked as Vacutainer XF 947 and it had the presence of the trademark designation ™. Ms. Campbell's evidence was that this did not cause her any concern in terms of her preparation to conduct

the analysis, nor the analysis procedure and process itself. But the fact that the symbol which appeared on the vacutainer label, the ™, was different that the R with a circle around it, ®, that she would normally see to denote a trademark or ownership, the fact did cause her to prepare a slightly different certificate of any analyst because as she expressed it in court today she was unsure whether the approved container definition as set out, with which she was familiar, would encompass the container which she was using at the time that the analysis was conducted and there is no dispute and counsel are agreed that the definition of the approved container, the 1985 definition, which I see was approved by then Mr. Crosbie I think it was, asserted that the definition of the approved container would be the Vacutainer XF 947, R with a circle around it, ®.

[18] Defence asserts that this imperfection, if you will, in the container that was being used by Ms. Campbell is of such a nature and sufficiency to cause the court to reject the evidence because the container being used was not within the definition of an approved container.

[19] The crown asserts that there is case law which will allow the court to reject the notion that the symbol ® must appear and I've had an opportunity to review the cases provided by the crown and it does appear certainly from the

R. v. Moody [1995] N.S.J. No. 114 S.W. No. 1467, decision of Justice Cacchione of the Supreme Court that the kind of approved instrument, in other words, the brand name if you will, "Borkenstein" was surplusage describing the inventor and did not affect the definition of approved instrument. I think if the principle of the **Moody** case were to be applied here, which I obviously am doing, I would have to say, given Justice Cacchione's findings, that the presence of the symbol ™ in the absence of the symbol ® would be matters of surplusage which would describe the ownership or the legal methodology of ownership, if I can use that phrase. I don't profess to know a great deal about trademarks but I would say that those symbols ascribe a particular set of criteria, I assume, about the ownership or certain standards about the ownership and they are related strictly to that, the legal ownership of the vacutainer. They have little, if anything, it would seem to me to do with whether the vacutainer device is the prescribed device.

[20] I note that the decision of Justice Batiot of this court in **R v. Green** [1991] N.S.J. No. 648, was that the essential elements of the identification of the instrument were that it was a breathalyzer model 900A. Obviously Judge Batiot was dealing with a breathalyzer there and the question of whether the

instrument was an approved instrument and I quote from Judge Batiot's commentary at paragraph 41 of the decision on page 6:

"The essential elements are the identification of the instrument i.e a breathalyzer, model 900A, and its description as an approved instrument. Both these are contained in the certificate of Constable Waghorn's further qualifications, out of habit I suppose, does not create an ambiguity. This argument must also be dismissed.

[21] In dismissing it Judge Batiot also referenced the **R. v. Janes** [1987] N.S.J. No. 395 decision which was provided to me as well. I don't see that there is really any difference between that situation which faced Justice Cacchione and Judge Batiot in the **Moody** and **Green** decisions.

[22] What we have before us is a vacutainer XF 947 which is the prescribed vessel according to the definition and I don't see how the presence or absence of any trademark notation or the presence of a different trademark notation could affect the validity of the use of that particular vessel. So, I am not satisfied that the defence assertion is justified and I find that the vessel which was used was the appropriate vessel even though the words ™ appeared on it instead of the ®.

[23] If I am incorrect in that analysis, I then rely on the decision in **R. v. Reutov** [1992] A.J. No. 292 as provided by the crown. I note the analysis is made by Judge Nemirsky in that decision at page 4 wherein the court stated:

> "Clearly the use of other than an Approved Container would preclude the crown's reliance upon the presumption under s. 258(1)(d) of the Criminal Code. But for reasons previously stated, the crown cannot in any event in this case rely on that presumption. The question of presumption aside, then, are the results of the analysis of a sample of blood collected in a non-approved container admissible in evidence, provided it can be shown that the sample has not been contaminated or tampered with. I have no doubt that they are. An examination of what here happened shows that after taking a sample, Dr. Lindsay affixed the tape seal on the container and then initialled the seal. The sample was refrigerated at the R.C.M.P. Detachment at Lac La Biche and was in due course transported to the Forensic Lab in Edmonton. The analyst who received and analyzed the sample kept the sample refrigerated, found the tape seal apparently intact, and was of the opinion that no decomposition has occurred. Further, she testified that following her receiving it, the sample was not contaminated by alcohol. Nothing in the evidence suggest to me that there was any improper handling of the sample. Accordingly, I find the results of the analysis to be admissible, notwithstanding that the container used was not an Approved Container."

[24] And likewise, we have very similar evidence in this case. The evidence of Constable Reid was that he placed various markings on the vials to identify them as being the vials which were filled in his presence. Dr. Porwal did the same, he placed his markings on the vials. The vials were packaged up by Constable Reid. The vials were contained through the exhibit locker and then removed by Deputy Chief Naylor. There's been no contest today as to continuity. Those same vials were sent by Deputy Chief Naylor to Halifax to Ms. Campbell, retrieved by Ms. Campbell. While they were undergoing analysis by Ms. Campbell the seals which had been placed on the container

by Constable Reid, one of them was broken by Ms. Campbell and the analysis was made by her. During the time she was doing so she kept the samples in her locker which was a locker to which only she had access by key. She then did her analysis, repackaged the material and sent it back to Constable Reid who opened it for the first time this morning here in court. There's nothing before me to suggest, based on the viva voce evidence of Dr. Porwal, Constable Reid and Lori Campbell, that the analysis was comprised in any way and I am satisfied that, even if I am incorrect about my legal analysis of what constitutes an approved container in this case, the results of the analysis are admissible even though the container may not have been an approved container.

[25] The next issue is whether the crown has met all of the criteria to have the s. 258 presumption operate in its favor. In particular, I refer to s. 258. It seems to me the sections upon which we are focussed are s. 258(1)(d), (d.1) and (e) which discuss beginning in s. (1)(d) where a sample of blood is taken, if the criteria in (d), (i) through (v) and if the provisions set out therein are all met, then the evidence of the result of the analysis is, in the absence of evidence to the contrary, proof that the concentration of alcohol

in the blood of the accused at the time when the offence was alleged to have been committed was the concentration determined by the analysis.

[26] If my analysis this afternoon about the approved container is incorrect then again there is the viva voce evidence of Ms. Campbell as to the 232 milligrams reading. Then the question becomes, is there evidence to rebut the presumption and if we look in 258(1)(d), (d.1) and (e), the wording that is used in the **Criminal Code** is:

> "The evidence of the result of the analysis is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was the concentration determined by the analysis."

[27] In that vein, the defence urges me to accept that there is evidence before me to rebut the presumption. Mr. Gregan reminded me that Dr. Porwal had said that the indicia of impairment that he had observed of Mr. Boudreau, being the smell of alcohol in particular, but all of the indicia that he observed could be consistent with head injury and that, therefore, the defence has met the requirement that it rebut the presumption on that basis

[28] I don't accept that that is the case, for the reason that Dr. Porwal's evidence, as I recall it and as I took it in my notes, was that the signs of impairment, the indicia of impairment which he observed could be consistent with a head

injury but that Mr. Boudreau was not suffering from a head injury. He observed that Mr. Boudreau was suffering from a laceration to the forehead and I certainly took it from Dr. Porwal's evidence that he was saying that while Mr. Boudreau's indicia of impairment could be consistent with a head injury, that there was no head injury in this particular case.

[29] The defence also asserts that the presumption has been rebutted by the evidence of the events of December 4th when Mr. Boudreau consulted with Dr. Porwal, and as I understood Mr. Gregan's comments, the assertion was that Mr. Boudreau's difficulties with medication and the symptoms that he was demonstrating as a result of those medications might easily explain why he exhibited the indicia of impairment that he did on the date of the offence, being November 29th. With respect, I have very great difficulty making what I would consider to be a quantum leap between the events of November 29th and the events of December 4th in the absence of some other evidence which would be stronger in weight, and its significance, and its implication than the evidence that Dr. Porwal gave on that point.

[30] Dr. Porwal's evidence was that he had no particular knowledge of Mr. Boudreau and the history of Mr. Boudreau's prescriptions and the history of his dosage other than what Mr. Boudreau was reporting to Dr. Porwal at

emergency on December 4th. He had no knowledge of Mr. Boudreau outside of that and he wasn't in a position to speak, other than generally, about the pharmacological effect of the medications which Mr. Boudreau was taking. He had no background to understand why Mr. Boudreau had the dosage that he did nor what Mr. Boudreau had reported to his family doctor that might result in that dosage nor whether that dosage had been one which was prescribed and increased over a period of time or prescribed as the precise dosage that Mr. Boudreau was then taking. There was nothing in Dr. Porwal's evidence to tell me what the connection, the specific connection, was between the pharmacological effect of the dosage of medications that Mr. Boudreau was receiving and how that might relate to the symptoms that he exhibited on November 29th and certainly not to any extent which I am satisfied would rebut the presumption pursuant to s. 258.

[31] Defence also argued that the extrapolation done by Ms. Campbell should not be relied upon by the court on the basis that there is no evidence about what Mr. Boudreau consumed in the half hour prior to the accident. The defence asserts that there is a basis then to challenge the assumptions made by Ms. Campbell which goes to the integrity of the calculations that Ms. Campbell made. I must say again that the evidence of Ms. Campbell, the viva voce

evidence, as to the reading of 232 milligrams of alcohol in one hundred milliliters of blood, being the blood alcohol level that she calculated was contained in the blood sample of Mr. Boudreau, is in and of itself evidence on its face. The 232 milligram reading was the reading that Ms. Campbell obtained and she gave viva voce evidence about that. So, I don't see that there is any need to even, although it's an interesting academic discussion, I don't see the need to even go the one step further and place any reliance or any necessity to have any reliance on her evidence as to extrapolation because there is the evidence, in and of itself, of the 232 milligram reading.

[32] The next issue, as I see it, is the issue as to whether the officer, Constable Reid, had the reasonable and probable grounds to provide, initially, a breath demand to Mr. Boudreau. Yes, he certainly did, I am satisfied on the evidence and the fact that I found to exist that Mr. Boudreau was exhibiting to the officer, when he arrived on the scene, indicia of impairment, his slurred speech and the smell of alcohol emanating from his breath to name but two.

[33] As it turned out, after Constable Reid provided Mr. Boudreau with his Charter caution and warning and read the breath sample demand to Mr. Boudreau, then the water on the beans changed a little bit. Mr. Boudreau

began, as Constable Reid described it, within seconds he began complaining of chest pains, and I can't recall exactly whether Constable Reid's evidence was that Mr. Boudreau began complaining of pain in his head or Constable Reid noted the injury, the laceration to Mr. Boudreau's head. But in any event, at that point Constable Reid made a determination because of the complaint of chest pains, he decided that he would, in the face of Mr. Boudreau's agreement to comply with the breath demand, Constable Reid decided he would subject or read to Mr. Boudreau a breath demand. I inferred from Constable Reid that his decision to do that was because Mr. Boudreau was complaining of chest pain and, indeed, in cross-examination that point got fleshed out a little more and Constable Reid said because the accused was complaining of the chest pain he thought that it would be an exercise in futility to require Mr. Boudreau to accompany him to the police station and he decided to proceed with the blood demand in light of the fact that Mr. Boudreau was being placed in the ambulance and taken to the hospital.

[34] S. 254(3) reads:

> "Where a peace officer believes on reasonable and probable grounds that a person is committing, or an any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under s. 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
(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, under the conditions referred to
in subsection (4), as in the opinion of the qualified medical
practitioner or qualified technician taking the samples
are necessary to enable proper analysis to be made in order to
determine the concentration, if any, of alcohol in the person's blood,
and to accompany the peace officer for the purposes of enabling such
samples to be taken.

[35] The upshot is that in this case Constable Reid first began with the breath demand, which was complied with, and then as soon as Mr. Boudreau complained of the chest pains, Constable Reid proceeded to the blood demand.

[36] Certainly it appears that Constable Reid had reasonable and probable grounds and I already alluded to that earlier in my decision. He had the grounds to make the demand. The defence asserted that he should never have made the blood demand because it was not reasonable to believe that Mr. Boudreau was incapable.

[37] With all due respect to Constable Reid, I am not satisfied that at the moment when Constable Reid provided the blood sample demand to Mr. Boudreau, he had reasonable and probable grounds to believe that by reason of any

physical condition of Mr. Boudreau, Mr. Boudreau was incapable of providing a sample. I think that at that stage, although Mr. Boudreau was complaining of chest pain and that certainly understandably alerted the officer to a possible problem, I think it was incumbent upon Constable Reid to do a little more to satisfy himself or to formulate reasonable and probable grounds to believe that a breath sample wasn't possible and a blood sample was required.

[38] Constable Reid could, given that Mr. Boudreau was on his way to hospital, easily have inquired about Mr. Boudreau's capacity to provide a sample of his breath versus a sample of his blood once the parties were there. There was no suggestion at that moment that the parties were anywhere outside the two hour limit. There was no matter of urgency that required a sample of blood as opposed to a breath sample at that particular moment. There was nothing about Mr. Boudreau's obvious physical condition which made it clear to any reasonable observer that he was incapable of a sample. He wasn't lying on the ground unconscious. He was fully alert and conscious and able to communicate, albeit in his slurred speech state. He was able to communicate. He'd understood the breath demand. He provided a response that he was willing to take the breath test.

[39] I can appreciate that Constable Reid may have been nervous or anticipating that there was going to be a problem and I can appreciate that he was, perhaps in his own way, trying to take the most prudent course open to him but I don't necessarily accept that what the officer sees as a technique of investigation open to him is necessarily, in this case, grounded upon reasonable and probable grounds to believe that a breath sample is absolutely not possible or that the person is incapable of providing it.

[40] So, although I've come at it the back way in giving my reasons, what I'm saying is that I don't accept that the officer had reasonable and probable grounds, although he had reasonable and probable grounds to make a demand for a breath test, he did not have reasonable and probable grounds to believe that Mr. Boudreau's physical conditions rendered him incapable of providing a breath sample. I don't accept that he had reasonable and probable grounds to believe that it would be impracticable to obtain a breath sample and, therefore, the samples which officer Reid obtained I find are, for that reason, not admissible.

[41] Because the samples are not admissible, the first count must fail if there is not proper evidence before the court as to the analysis of the blood alcohol count.

[42] That brings us to the second count and the issue as to whether the crown has proven the offence of impaired driving. In relation to the impaired driving charge, we have before us the evidence of Ms. Hurley, and the evidence of Ms. Myles, and the evidence of Ms. Black. I don’t intend to re-canvas that evidence. I have made certain findings of fact in relation to what each of those witnesses observed and for the purposes of the analysis of the second count on the information, I would simply repeat my observations and my fact findings about the evidence of those witnesses, all of whom I found to be credible.

[43] There is also the evidence of Constable Reid as to the signs of impairment which he observed, most notably, the slurred speech and odour of alcohol and if I haven’t said it already, I am satisfied, based on the evidence of Constable Reid, that he observed those indicia of impairment and I find as a fact that they did exist.

[44] On the evidence of Sergeant MacPherson, there was noted by Sergeant MacPherson the signs of impairment which were noted by other witnesses as well, being the odour of alcohol. But in addition to that, Sergeant MacPherson was able to articulate and I accept and find as a fact that Mr. Boudreau was having difficulty with what we commonly refer as his gross

motor skills. Sergeant MacPherson made particular reference to Mr. Boudreau having slow, exaggerated movements of the arms. He had an opportunity to observe Mr. Boudreau in the bed in the trauma unit of the hospital and, indeed, Sergeant MacPherson related how he was with Mr. Boudreau for a period of approximately three hours and during that time he noted the signs of impairment to the point where Sergeant MacPherson was not prepared to release Mr. Boudreau because he was concerned that Mr. Boudreau continued to exhibit those signs of impairment even after medical personnel were satisfied that it was safe to release Mr. Boudreau from the hospital on a medical basis.

[45] The evidence of Dr. Porwal was that he could smell an odour of alcohol emanating from Mr. Boudreau's mouth and that is consistent with the evidence of the police officers and the other civilian witnesses.

[46] I am satisfied, beyond a reasonable doubt, that the crown, has made out the elements of the offence of impaired driving. I am satisfied that Mr. Boudreau was the operator of the vehicle. I am satisfied, beyond a reasonable doubt, that his ability to operate that vehicle was impaired by alcohol. There was some discussion, I guess, with Dr. Porwal about Mr. Boudreau's consumption of drugs. But again, for the reasons I outlined

earlier, I am not satisfied that I can find that one day is connected to the other. There is no direct evidence before me that Mr. Boudreau was impaired by a drug but I am certainly satisfied, based upon the evidence of the civilian witnesses and the police witnesses, that he was impaired by alcohol to the point where Mr. Boudreau had insisted, at least to officer Reid, that he was the person who had been struck in the accident when it was clear to all parties present that Mr. Boudreau was operating the vehicle that did the striking, if we can put it that way.

[47] So, I am satisfied Mr. Boudreau had the care and control of the vehicle at the relevant time, date and place and there is nothing before me other than overwhelming evidence of his impairment and I find Mr. Boudreau guilty of the offence contrary to section 253(a).