IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Nauss, 2007 NSPC 22

Date: 20070528
Docket: 1701296
Registry: Bridgewater

Between:

R.

v.

Adam Joseph Nauss

Judge:	The Honourable Judge Anne E. Crawford
Heard:	May 28, 2007, in Bridgewater, Nova Scotia
Charge:	253(b) CC
Counsel:	Craig Harding, for the Crown Alan Ferrier, for the Defence

By the Court:

[1] Adam Nauss is charged under s. 253(b) of the *Criminal Code* with driving with a blood alcohol level over the legal limit.

Issue

[2] At the conclusion of the Crown case, the defence elected not to call evidence but raised the issue of the admissibility of the results of the approved screening device test because of alleged breaches of the defendant's *Charter* rights, as follows:

> 1. Cst. Russell's eliciting from the defendant an admission that he had consumed alcohol;
>
> 2. Cst. Rogers's getting the defendant to step out of his vehicle without having grounds to arrest him;
>
> 3. Cst. Rogers's locking him in the back of the police vehicle, without arresting him or having grounds to arrest him;
>
> 4. The time that elapsed between having grounds for the ASD demand and the making of that demand

Facts

[3] The facts relevant to this issue are as follows.

[4] The defendant was the driver of an extended cab truck, a motor vehicle, which was stopped by Csts Russell and Rogers in the Town of Bridgewater, Nova Scotia around 2:20 a.m. on October 20, 2006. They had seen him earlier, as he came out of Tomorrow's Lounge at closing time. He had walked over to the police vehicle and had a short friendly conversation with Cst. Russell, as they were acquainted with each other previously. He left that area with a number of friends on foot.

[5] When they later encountered the truck, Cst. Russell recognized it as being the one he habitually drove, and they stopped it because, from the defendant's demeanour during the earlier conversation and the fact that they had seen him come out of the lounge, they suspected that the driver had been drinking.

[6] Cst. Russell went to the driver's window and asked the defendant, who was the driver, for his licence, permit and proof of insurance. She told him that she stopped him because she had a suspicion that he was under the influence of alcohol. He replied that he had only had two beers.

[7] Cst. Russell motioned for Cst Rogers to come the defendant's truck window because she was suffering from a cold or allergies and could not detect any smell of alcohol. Cst. Rogers almost immediately asked him to get out of the truck, as he could smell alcohol from the interior and wanted to separate the defendant from the passengers to determine if there was an odour from the defendant.

[8] Outside the vehicle Cst. Rogers smelled alcohol on the defendant's breath and formed the opinion that he was operating a motor vehicle with alcohol in his body. At 2:25 a.m. Cst. Rogers asked him to go back to the police vehicle and told him he was going to read him "the SL-2 demand."

[9] Cst. Russell testified that, as she was dealing with an obstreperous passenger, she heard Cst. Rogers read the demand and radioed Sgt. Milbury at the Police Department, a couple of blocks away, to bring an ASD, as she did not have one in the police vehicle. She said that he arrived with the device within two or three minutes.

[10] Cst. Rogers was not sure when Cst. Russell called for the device, or how it got there. All he could remember was that it was there at 2:31 a.m. when he read the Approved Screening Device demand to the defendant . The defendant complied with the demand and at 2:32 a.m. he provided a sample which registered a "fail."

[11] The breathalyzer demand followed and eventually resulted in readings of 230 milligrams percent and 220 milligrams percent.

[12] The defence admits that, if the result of the ASD demand is properly before the court, all elements of the offence are established.

1 & 2. Limits of Investigative Detention

[13] In *R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3; [2005] S.C.J. No. 37 the Supreme Court dealt with the issue of roadside detentions and screening for drinking drivers, and decided that brief detention and questioning, including performing simple

sobriety tests, although breaches of the right to counsel, were justified under s. 1 of the *Charter*, given the regulated nature of the activity involved and the importance of the police duty to protect life and property on the public roads. As Charron, J stated:

> ¶ 49 To return to the case-specific inquiry relevant to this appeal, in *Orbanski*, the officer asked the driver if he had been drinking, to which Orbanski answered that he had had one beer at two o'clock. Similarly, in *Elias*, the driver was asked whether he had been drinking, and he replied that he had. In both cases, the driver's answer was part of the information used by the officer to form the reasonable suspicion necessary to request a roadside breath sample in the case of Elias, and the reasonable and probable grounds necessary to request a breathalyzer test in the case of Orbanski. The questions were relevant, involved minimal intrusion and did not go beyond what was necessary for the officer to carry out his duty to control traffic on the public roads in order to protect life and property. In my view, the police officers [page29] were authorized in each case to make such inquiries.
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> ¶ 52 . . . In *Thomsen*, this Court held that the exercise of the right to counsel was incompatible with the operational requirements underlying the demand for a sample for analysis in a roadside screening device made pursuant to s. 234.1(1) of the *Criminal Code* (now s. 254(2)). . . . In my view, it logically follows from *Thomsen* that a limit on the right to counsel is also prescribed during the roadside screening techniques utilized in these cases. If a limit on the right to counsel is prescribed during compliance with a s. 254(2) demand for a sample for analysis in the roadside screening device, then the limit must necessarily be prescribed during the screening measures preceding the demand, conducted with the very objective of determining whether there is a reasonable suspicion justifying the demand.

[14] I see no distinction between what was done by the officers in *Orbanski* and *Elias* and the actions of the police officers here in eliciting from the defendant an admission that at some point he had been drinking and in asking him out of his motor vehicle so that the officer could smell his breath.

3 & 4. The meaning of "forthwith"

[15] I have previously considered the issue of detention in the context of an approved screening device demand in *R.v. Simmons*, [2006] N.S.J. No. 362 (N.S.Prov.Ct), upheld on appeal [2007] N.S.J. No. 138 (N.S.S.C.) and in *R. v. Wentzell*,[2006] N.S.J. No. 423 (N.S.Prov.Ct.).

[16] In the *Simmons* case after considering *R. v. Grant* (1991), 67 C.C.C. (3d) 268 (S.C.C.), *R. v. Cote* (1992), 70 C.C.C. (3d) 280 (O.C.A.), *R. v. Debaie* (2000), 187 N.S.R. (2d) 188 (P.C.), and *R. v. Woods*, 2005 SCC 42, [2005] 2 S.C.R. 205, I concluded that, in the unusual circumstances of that case, a delay of thirty-three to thirty-five minutes in making the demand was justified and that, despite the delay, the demand was a proper one. The reasons for so finding included that the police officers were preoccupied with dealing with a serious threat to public safety created by the defendant; and that the defendant had already been given his *Charter* rights in regard to other more serious offences, on which he was being held anyway.

[17] In the *Wentzell* case, I concluded that a seventeen minute detention while an officer qualified to give the ASD demand arrived with a device was not justified and that the demand was not within the requirements of s. 254 because there were no unusual circumstances and the defendant was not informed of the reason for his detention or even that he was being detained.

[18] As I concluded in *Simmons*:

> . . . the reason underlying the "forthwith" requirement in s. 254(2) is two-fold:
>
> 1. To provide a quick way for the police to sort out possibly impaired drivers from those who are not, so that innocent drivers will be inconvenienced as little as possible;
>
> 2. To ensure that the right of possibly impaired drivers to be informed of their right to counsel is infringed for as short a period of time as possible.

[19] Considering the circumstances here in light of the foregoing reasons I find that the delay of, at most, six minutes from being asked to take a seat in the police vehicle and the making of the demand is within the meaning of "forthwith" because:

> 1. the incident occurred within a block or two of the police station so that a device was almost as available as it would have been in the police vehicle itself;
>
> 2. the defendant was informed of the reason for the detention from the outset; and
>
> 3. the detention was too short to allow for any realistic opportunity to consult counsel before the administration of the test.

Conclusion

[20] The result of the Approved Screening Device test – a fail – is properly before the court to ground the breathalyzer demand, so that all elements of the offence have been established beyond a reasonable doubt. The defendant is therefore guilty as charged.