IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Harrison, 2005 NSPC 20

Date: 20050615
Docket: 1474608, 1474609
Registry: Bridgewater

Between:

R.

v.

Lawrence Walter Harrison

Defendant

Judge: The Honourable Judge Crawford

Heard: April 18, 2005 in Lunenburg, Nova Scotia

Counsel: Lloyd Tancock, for the Crown
Mark Dempsey, for the Defence

By the Court:

[1] Lawrence Walter Harrison is charged under Criminal Code section 253 (a) and (b) with operating a motor vehicle while impaired by alcohol and operating a motor vehicle with a blood alcohol concentration in excess of 80 milligrams of alcohol in 100 millilitres of blood.

Facts

[2] The trial proceeded as a *voir-dire* on the admissibility of the Certificate of Qualified Technician. The evidence established the following facts.

[3] On October 9, 2004 at 11:33 p.m. the defendant's motor vehicle was stopped at a checkpoint in Wileville, Lunenburg County, N.S. just thirty feet from the boundary with Bridgewater.

[4] Sgt. Jeff Wells of the R.C.M.P. South Shore Traffic Services unit approached the vehicle and noted a smell of alcohol coming from the area of the driver's window. He remarked to the defendant, "You've been drinking tonight," and asked him to pull over to a near-by parking lot and then to come back to his police vehicle. As the defendant complied, he noted that the defendant was unsteady on his feet and seemed to lose his balance when the officer opened the police car door to let him in the back.

[5] Inside the police car the smell of alcohol was strong and Sgt. Wells then determined to make an approved screening device demand on the defendant. On cross-examination, Sgt. Wells stated that it was after observing his unsteadiness and stumble in walking and smelling alcohol from him in the police vehicle that he determined to give him the roadside screening device demand.

[6] He asked him when he had had his last drink to make sure that at least 15 minutes had gone by and then read the demand to him. The defendant replied, "No problem" and indeed had no problem in providing the sample.

[7] At 11:40 p.m. Sgt. Wells informed him that he had failed the screening device and at 11:42 p.m. he read him the breathalyzer demand and asked him if he understood it. The defendant replied, "Yeah, ok."

[8] Sgt. Wells then read him his Charter right to counsel, including the right to free access to duty counsel. He replied that he understood, and when asked if he wanted to call a lawyer replied, “Not at this time.” Sgt. Wells then read him his right to apply for Legal Aid; Sgt. Wells testified that, although he neglected to record his answer in his notes, he remembered that the defendant replied, “Yes”, to his question “Do you understand?”

[9] Sgt. Wells drove him to the Bridgewater R.C.M.P. office in Cookville, where they arrived at 11:52 p.m. Sgt. Wells introduced the defendant to Cst. Garth Stevenson, the breathalyzer operator, telling Cst. Stevenson that the defendant had failed the approved screening device, had been given his rights and had said that he did not want a lawyer.

[10] Cst. Stevenson performed the breathalyzer test and prepared the Certificate of Qualified Technician which was produced in evidence. It shows that two samples were taken from the defendant at 12:08 a.m. on October 10, 2004 and at 12:31 a.m. on the same date and that the result of the analysis of each sample was 140 milligrams of alcohol in one hundred millilitres of blood.

[11] The defendant testified that he was given his right to counsel, including a toll-free number, and replied, “Not at this time.” He said he did not have a phone with him and did not see a phone he could use in the police car. He said he was not offered a phone at the detachment, nor did he ask for one, but if he had had a chance to use a toll-free number, “I probably would have used it”.

Issues

[12] The defence raised four issues in this case:

1. grounds for roadside screening demand

2. defendant’s understanding of the right to counsel

3. waiver of right to counsel

4. proof of impairment under s. 253 (a)

[13] The first three are *Charter* issues as to admissibility of the Certificate of Qualified Technician. In regard to all three of these issues the burden is on the defendant on a balance of probabilities to establish that the relevant *Charter* right was breached.

1. Grounds for Screening Device Demand

[14] The defence argues that because the police officer did not have grounds to make the roadside screening demand until he had observed the defendant walk back to the police vehicle, he had no authority to ask him to accompany him back to the police vehicle, and therefore that everything that happened subsequently should be inadmissible.

[15] This argument is based on *R. v. Adams* (2002, unrep. N.S.P.C.) in which Tufts, J.P.C. considered *R. v. Baroni*, [1989] N.S.J. No. 242 (N.S.C.A.) and *R. v. MacLennan*, [1995] N.S.J. No. 77 and concluded at para [15]:

> . . . There was no legal authority for the police officer to require the defendant to go back to the police cruiser. The officer was not going there to further check the defendant's license or registration, for example, and wanted the defendant in the police car to avoid leaving him alone in the vehicle. The only reason for the police action was to conscript the defendant by observing him walking back to the police car. This was not an action prescribed by law. In my opinion this amounts to a coordination or sobriety test and fits within the *ratio decidendi* of the *Baroni* decision. The police action here is outside the limits prescribed by the *MacLennan* decision and, in my view, cannot be saved by s. 1 of the *Charter*.

[16] *MacLennan* and *Baroni* both make it clear that sobriety tests conducted prior to informing the subject of his right to counsel breach his s. 10(b) right to counsel. However, *MacLennan* contrasted sobriety tests with "passive observation" of a subject:

> ¶ 55 It is true that Constable Byrne wished to observe Mr. MacLennan away from his vehicle so she could tell whether the odour of alcohol was coming from him or the spilled beer in the car. She was entitled to ask him to come to the police vehicle, and there was nothing improper about her using that as a device to further her legitimate objectives. The jurisprudence cited above makes it clear the Supreme Court of Canada approves of police making use of the opportunities provided by their right to inspect documents to make the observations necessary to detect drinking drivers. No infringement of s. 8 occurred.

> ¶ 56 Observing Mr. MacLennan in the course of proper police procedures is a different matter from conscripting him to perform sobriety tests for the purpose of incriminating himself which was found objectionable in Baroni. There was no statutory or common law authority validating the sobriety tests. There is strong authority for the observation of indicia of impairment emanating from the respondent in the course of routine procedures during a roadside stop.
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> ¶ 57 The indicia of Mr. MacLennan's impairment observed by Constable Byrne were passive emanations flowing from the fact he had had so much to drink that it showed it in his odour, his speech and his movements. In these circumstances there was no improper intervention by the officer in conscripting him against himself or which violated his reasonable expectations of privacy. He knew he could be asked to produce his documents if he drove his vehicle on a highway, and that in doing so he might be requested to attend at a police cruiser. Knowing that, he consumed the alcohol voluntarily and then chose to drive on a highway. Constables Byrne and Merrell protected Mr. MacLellan, his passenger and the public by alert police work.

[17] With the greatest respect for Judge Tuft's opinion to the contrary, in my opinion in the present case, asking the defendant back to the police vehicle and observing him as he did so was not a sobriety test within the meaning of *Baroni*, but was a merely passive, non-conscriptive observation of indicia of impairment in the course of a routine procedure at a roadside stop, as mandated in *MacLennan*.

[18] I find that, having concluded, as he said, that the defendant had been drinking that night, the police officer was entitled under s. 254(2) to ask the defendant back to the police vehicle and that observing him as he walked did not infringe his *Charter* rights. Accordingly, the officer had properly admissible grounds to make the roadside screening device demand.

2. Did the defendant understand his right to counsel?

[19] I find nothing in the evidence here to indicate anything other than that the defendant understood the essence of the rights read to him by the police officer, i.e. that he could talk to a lawyer, even after business hours if he wished. In addition, I accept the police officer's testimony and find as a fact that he told the police officer he understood both his right to a lawyer and his right to apply for legal aid. Absent some indication that in fact he did not understand, the officer was under no duty to explain further. *R. v. Evans,* [1991] 1 S.C.R. 869.

3. Waiver of right to counsel

[20] The defence argues that the defendant's reply "Not at this time," is not a clear waiver of his right to counsel, within the meaning of *R. v. Brydges* (1990), 53 C.C.C. (3d) 330 (S.C.C.). In that case, the accused told the investigator that he didn't know any lawyer, then asked if legal aid was available, and that "the main thing" was that he wouldn't be able to afford anyone, and then, when he was asked "You feel there's a reason for you maybe wanting to talk to one [a lawyer] right now?" he replied, "Not right now, no". The trial judge and the Supreme Court of Canada both held that this was not an unequivocal waiver of his right to counsel because he had indicated that his concern was not being able to afford a lawyer.

[21] In the present case, however, whatever may have been going on in the defendant's mind, he communicated nothing to the police officer other than "Not at this time." On the witness stand the defendant said that he was concerned about the apparent lack of a telephone. But he asked no questions and made no statements either in the police vehicle or at the detachment office to indicate any qualification or uncertainty in his decision that he did not want to talk to a lawyer "at this time".

[22] *Brydges* makes it clear that a detainee must be diligent in his exercise of his right to counsel, and that if he is not, then the duty on the police to "hold off" questioning or obtaining evidence from the detainee is suspended (C.C.C. p. 341).

[23] On the facts in the present case I find that, having properly dealt with the informational component of s. 10(b) of the *Charter* and having received an apparently firm negative response to the question regarding contacting a lawyer, Sgt. Wells was entitled to conclude that the defendant had unequivocally declined to exercise his right to counsel.

[24] I conclude that there was no breach of the defendant's right to counsel.

4. Proof of impairment under s. 253(a)

[25] If it were not for the Certificate of Qualified Technician, I would find no evidence of impairment in the defendant's ability to drive.

Conclusion

[26] For the reasons previously stated I find that the Certificate of Qualified Technician is admissible and, as it establishes conclusively that the defendant's blood alcohol concentration at the time of driving was 140 milligrams of alcohol in one hundred millilitres of blood, he is guilty as charged under both ss. 253 (a) and (b) of the Criminal Code. However, a stay will be entered in accordance with the *Kienapple* principle in regard to the s. 253(a) charge.