IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Herrick, 2005 NSPC 22

Date: 20050620
Docket: 1416719 & 1416720
Registry: Bridgewater

Between:

R.

v.

John Alexander Herrick

Defendant

Judge: The Honourable Judge Crawford

Heard: May 12, 2005, in Kentville, Nova Scotia

Counsel: Lloyd Lombard, for the Crown
Chris Manning, for the Defence

By the Court:

[1] John Alexander Herrick faces charges under section 253(a) and (b) of the *Criminal Code* in regard to having care and control of his motor vehicle while impaired and while having a blood alcohol concentration above the legal limit.

Issue

[2] This case raises one narrow issue: was the defendant in care and control of his motor vehicle when he was found by the police officer.

Facts

[3] On March 27, 2004 Cst. Burke of the Kingston R.C.M.P. detachment was patrolling in the parking lot of the Top Hat tavern in Greenwood, Kings County, Nova Scotia when he was flagged down by a civilian who made a complaint about someone sleeping in his car in the parking lot of the drinking establishment where she worked.

[4] He attended at that parking lot and at 12:28 a.m. he pulled his police vehicle in behind the car in question, which was running, with the headlights on. He saw the defendant sleeping in the driver's seat of the motor vehicle and got no response when he knocked on his window. He opened the driver's door and saw that the defendant was sitting in the driver's seat. It was not until the officer identified himself that the defendant woke up, apparently confused and disoriented.

[5] The defendant exhibited strong indicia of impairment; the breathalyzer demand was made with appropriate *Charter* rights and the defendant eventually provided samples of his breath to the breathalyzer machine, which gave readings of 140 and 150 milligrams of alcohol in 100 millilitres of blood at 1:29 a.m. and 2:09 a.m. respectively.

[6] The defendant testified that on March 26th he worked at his business until 5 p.m., then he and his brother had "a debriefing" in his office over a "couple of rum and coke". From 6 p.m. to 9 p.m. he and his wife visited with his son and family. No alcohol was consumed there.

[7] After taking his wife home he went to the Wing Club to book a date for his company Christmas party. He said that after making the necessary arrangments he

had three to four glasses of wine there with friends, and, having skipped dinner, he started to feel the effects of the wine. He decided not to drive home and called his son to come get him. But there was no answer. So he left the bar around 10:30 or 10:45 p.m., when his friends left and went to his car to wait to call his son again, but fell asleep before he could do so.

[8] He took photos which were produced in court. They show the area of the parking lot where he was parked on the night in question and the interior fittings of his Volvo car. He described the parking lot as being fairly flat and stated that a motor vehicle parked there would not roll on its own without power – and, on cross-examination, Cst. Burke confirmed this.

[9] He said that it was chilly that night and he started the car and turned on the heater to keep warm. The headlights come on automatically when the engine is turned on. His car is an automatic with a gear shift on a floor console. To put the car in gear, one has to depress the brake pedal to unlock the steering wheel, and at the same time depress a button on the gear shift while moving the shift out of the "park" position. In other words, it would be virtually impossible to set the car in motion unintentionally or accidentally, even with the engine running.

Presumption of care and control under *Criminal Code* s. 258(1)(a)

[10] Section 258 (1) (a) reads in part as follows:

> 258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),
>
> (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle,. . . the accused shall be deemed to have had the care or control of the vehicle, . . . unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle . . . in motion. . .;

[11] If the defendant had not testified, the Crown would have been entitled to rely on the presumption in this section to establish beyond reasonable doubt that, because the defendant was found in the driver's seat, he was in care and control of his car. However, in this case, the defendant did testify. I found him to be a credible witness and I accept, on a balance of probabilities, that he did not get into the driver's seat or start the car for the purpose of setting the vehicle in motion.

[12] Thus the presumption in s. 258(1)(a) has been rebutted and I must consider whether, without benefit of the presumption, the Crown has proven beyond reasonable doubt that the defendant was in care and control of his car when he was found asleep behind the wheel by Cst. Burke.

Care and control without the presumption

[13] In *Ford v. The Queen* (1982), 65 C.C.C. (2d) 392, Ritchie, J. held for the majority:

> . . . There is a wide difference between rebutting a statutory presumption and establishing innocence. The statutory presumption affords an aid to the Crown in the proof of its case, but this is far from saying that the evidence which rebuts such a presumption necessarily carries with it an acquittal.
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> In the present case the appellant was found to be the owner of the motor vehicle in question and to have been in and out of it numerous times during the course of the evening, and there was also evidence that he turned the engine on and off a number of times in order to use the heater. These are all additional factors tending to establish care or control so that under the particular circumstances of this case rebuttal of the presumption created by s. 237(1)(a) is far from conclusive on the issue of the guilt or innocence of the appellant.
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> Nor, in my opinion, is it necessary for the Crown to prove an intent to set the vehicle in motion in order to procure a conviction on a charge under s. 236(1) of having care or control of a motor vehicle, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 mg. of alcohol in 100 ml. of blood. **Care or control may be exercised without such intent where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent.** [emphasis added]

[14] Three years later in *R. v. Toews* (1985) 21 C.C.C. (3d) 24, McIntyre, J. for the court stated:

> **. . . acts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous.** Each case will depend on its own facts and the circumstances in which acts of care or control may be found will vary widely. In

> *Ford*, the appellant's vehicle and others were in a field open to the public. A drinking party was in progress in the car, and the appellant had occupied the driver's seat and had turned on the ignition on various occasions to operate the heater as the party progressed. These facts were considered sufficient to establish care or control. In the case at bar the car was on private property and the respondent was not in occupation of the driver's seat. He was unconscious and clearly not in *de facto* control. The fact of his use of a sleeping bag would support his statement that he was merely using the vehicle as a place to sleep. There remains the fact that the key was in the ignition and that the stereo was playing. Strangely enough, however, there is no direct evidence that the respondent put the key in the ignition or turned on the stereo, and the evidence is that the last driver of the vehicle was his friend, who drove him to the party and who was to drive him home. I consider that in view of all the circumstances described above no adverse inference should be drawn in this case on the basis of the ignition key evidence alone. It has not been shown then that the respondent performed any acts of care or control and he has therefore not performed the *actus reus*. [emphasis added]

[15] These cases have been followed and cited in many subsequent cases across Canada, both at trial and provincial appellate courts. Each case turns on its own facts, and *Ford* and *Toews* have been cited both to convict and to acquit defendants in what on the surface at least appear to be very similar fact situations.

[16] The defence relied, in addition to *Ford* and *Toews*, on *R. v. Parks*, [2003] N.S.J. No. 204; 2003 NSPC 21 (N.S.P.C.) and *R. v. Kuokkanen*, [2005] O.J. No. 1815; 2005 ONCJ 148 (O.C.J.).

[17] In *Parks*, Batiot, J.P.C. held that the defendant, who was found asleep in the driver's seat of his truck with the keys in the ignition in the parking lot of the nursing home where his sister worked, had successfully rebutted the presumption and concluded that "the Crown has not proven beyond reasonable doubt the presence of the necessary risk to establish care or control" and found the defendant not guilty.

[18] In *Kuokkanen*, D.P. Baig, J. found that the defendant, who had gone back to his car to wait for his friends with whom he had been drinking and with whom he planned to take a taxi home, had no intention to drive and had therefore rebutted the presumption. He then considered "the danger that the legislation intends to prevent . . . that the defendant will intentionally or unintentionally set the vehicle in motion while in a state of impairment." He stated that he was not concerned in this case that the defendant would intentionally set the vehicle in motion, because of the plan that he and his friends had set up and followed throughout the evening, and he found that

it would have been necessary for the defendant to have gone through the several steps necessary to set the vehicle in motion unintentionally and therefore acquitted the defendant.

[19] Although both these cases are persuasive, neither is binding upon me.

[20] On the other hand two of the most relevant cases cited by the Crown, *R. v. Hein*, [1999] N.S.J. No. 421 (N.S.S.C.) and *R.v. Lockerby* (1999), 139 C.C.C. (3d) 314 (N.S.C.A.) are binding authorities.

[21] In *R. v. Hein* MacDonald, A.C.J.S.C. (as he then was) allowed the Crown's appeal from an acquittal at trial. The defendant and a friend were celebrating the end of the defendant's first university term at a local bar. They drove there in the defendant's car, but on leaving the bar their intent was to take a taxi home. While waiting for a taxi to come by, they entered the defendant's car to keep warm. The defendant was in the driver's seat with the ignition and heater switch turned on when the police approached. MacDonald, A.C.J. found that the trial judge had correctly assessed the risk to the public of the defendant unintentionally setting the vehicle in motion, and continued:

> ¶ 15 However, the learned Trial Judge appears not to have assessed the risk of the Respondent, in her impaired state, changing her mind and deciding to drive home. As with *Price* and *Diotte supra*, I find this to be a real and substantial danger in the case at bar. Further I find with greatest respect that the Trial Judges's failure to assess this risk constitutes an error in law.

[22] The facts in *Lockerby* are as set out in the C.C.C. headnote:

> . . . After attending a party, the accused and others went to a restaurant. A friend of the accused drove the accused's car. Upon arriving at the restaurant, the accused's friend left the vehicle to go in the restaurant to look for other friends. The accused's friend left the vehicle, which had a standard transmission, in neutral, with the engine running and the emergency brake engaged. When the accused and the others were still in the vehicle they decided that they would eat at the restaurant whether or not they found their friends there. The accused then moved to the driver's seat to shut the car off and put it in gear. The accused did not move the car, and the trial judge accepted his evidence that he did not get behind the wheel for the purpose of putting the vehicle in motion.

[23] In upholding the conviction at trial and on summary appeal, Cromwell, J.A. stated at p. 329:

> Mr. Lockerby's principal contention on appeal is that risk of setting the vehicle in motion is an essential element of the offence and that no such risk was present here. He argues that is not a crime to get behind the wheel of a car to turn it off and put it in gear while having more than the legal limit of alcohol in the blood. I do not accept this argument. Assuming without deciding that risk of setting the vehicle in motion is an essential element of the offence, the trial judge made a clear finding that such risk existed here. That factual finding was upheld on appeal to Davison J. and it is supported by the evidence. Risk is not to be assessed with the benefit of hindsight or on the assumption that the appellant's actions would, in fact, accord with his intentions. The appellant's own testimony at trial is, in my view, conclusive on this issue. He agreed in his testimony (set out above) that he was sitting in the driver's seat, with the keys in the ignition and that he could have driven the car if he had wanted to. **In my view, when a person with more than the legal limit of alcohol in his or her blood has the present ability to make the car respond to his or her wishes, there is a risk that the car may be placed in motion, even where the person's intentions are not to do so.** [emphasis added]

[24] To the extent that the Saskatchewan Court of Appeal reached a different conclusion regarding risk in *R. v. Shuparski* (2003), 173 C.C.C. (3d) 97, I am bound to apply the foregoing ruling of the Nova Scotia Court of Appeal.

[25] Applying *Hein* and *Lockerby* to the present case, I note that, although the defendant's intention was not to drive and that the risk of unintentionally setting the car in motion was negligible, he was in "possession and superintendance" of his vehicle; it was his car; he was behind the wheel; he put the key in the ignition and started the heater; there was no one else with him who could drive; and although earlier he had planned to call his son, he had not done so when he fell asleep; he planned to go home and at that late hour, there was a real risk that on awakening he might change his mind and decide to drive himself home.

[26] I find that the defendant was in care and control of his motor vehicle with more than the legal limit of alcohol in his blood.

Conclusion

[27] The defendant is guilty as charged on both counts. In accordance with the *Kienapple* principle a stay will be entered on the impaired charge.