IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Woods, 2005 NSPC 25

Date: 20050708
Docket: 1416780 & 1416781
Registry: Kentville

Between:

R.

v.

Noella Woods

Defendant

Judge: The Honourable Judge Crawford

Heard: May 12, 2005 in Kentville, Nova Scotia

Counsel: Lloyd Lombard, for the Crown
Thomas MacEwan, for the Defence

By the Court:

[1] Noella Woods is charged under subsections 253 (a) and (b) of the *Criminal Code* with impaired care and control and with care and control with a blood alcohol concentration over the legal limit.

Facts

[2] In the late afternoon of Saturday, March 20, 2004, the defendant's motor vehicle, with the defendant at the wheel, went off the North River Road in the area of Aylesford Lake, Kings County, Nova Scotia. Most witnesses agree, and I find as a fact, that the road was icy and slippery. The vehicle left the road on a sharp turn, rolled and ended upright in a snow bank. The defendant was alone in the vehicle and was not injured, except for a possible slight bump to her head.

[3] The first witness, Deborah Faye Sawler, testified that she came on the scene around 5 p.m. and found the defendant still in her vehicle. She said that Dr. Gallant, who did not testify, came along around the same time. Together they waded through deep snow to get to the driver's door and speak to the defendant, who was still sitting in the driver's seat with the engine running.

[4] Dr. Gallant asked another passer-by to call 911 and then offered the defendant her car as a place to wait. Ms. Sawler said that the defendant waited there until John Millsom came on the scene about fifteen minutes later. The defendant went and sat in his car.

[5] John Millsom testified that he knew the defendant because his son and the defendant's played baseball together. He arrived on the scene around 5:15 or so and stopped to see if everyone was all right. The defendant came over to his vehicle. He described her as being pretty shaken up, distraught and nervous. She got in his vehicle and went with him to his home, where he had to unload groceries he had purchased. She had a liquor bag in her hand and he believed she had a couple of beer in it.

[6] The defendant went in the house with him and while he unloaded groceries and put them away, she opened a beer from her bag and drank at least part of it. Mr. Millsom described her as being nervous and shaking, but said that he did not notice her staggering "very heavily"; nor did he make any observations as to her sobriety.

[7] He did not know if she consumed all of the can of beer she opened and he only saw her open one beer.

[8] She wanted to go home; so after he finished putting his groceries away they left for her home, but stopped at his office in Cambridge and talked in the parking lot for twenty minutes or half an hour; then he drove her home to Coldbrook and found that the police were there.

[9] Cst. Lutz of the R.C.M.P. Annapolis Valley Traffic Service testified that at approximately 5:05 p.m. on March 20, 2004 he received a complaint of a single motor vehicle accident on the North River Road near Aylesford Lake, Nova Scotia. He drove to the scene from Coldbrook, arriving at 5:20 p.m. He found the defendant's green SUV Jimmy off the highway and unattended. Dr. Gallant and the passer-by who had called in the complaint told him that the defendant had left in a green Ford Explorer. They said alcohol was involved and that the defendant left with a bag of alcohol.

[10] Cst. Lutz spent the next fifteen minutes searching the area for the green Explorer, but was unsuccessful in locating it. He returned to the scene and called for a tow truck and then went to the defendant's home address, which he obtained from the Registry of Motor Vehicle records.

[11] As he arrived he saw the Explorer arriving at the residence, pulled in behind it and spoke to the defendant. He explained that he was investigating the motor vehicle accident on the North River Road and asked her back to his police vehicle. At 6:36 p.m., when he first spoke to her, he smelled a strong odour of alcohol from her breath, and noted that she was unsteady on her feet, that her eyes were bloodshot and that her speech was slurred. She appeared to him to be intoxicated and he immediately formed the opinion that she was impaired by alcohol and unfit to drive a motor vehicle.

[12] At 6:38 p.m. he read her the *Charter* right to counsel, gave her phone numbers for duty counsel and informed her of her right to apply for legal aid. In response to his questions she stated that she understood her right and did not want to speak to a lawyer. He read the standard police warning and she said that she understood. He then asked her about the accident.

[13] At trial the defence waived the necessity of a *voir-dire* and her responses to his question were admitted as being free and voluntary. Cst. Lutz testified that she told him that she met another vehicle and went off the road when she struck some ice. She stated that she had not had anything to drink after the accident, but that before it she had had two beers and some vodka. Cst. Lutz asked her if she had had anything to drink in the Explorer and she replied, "No; I finished it at a friend's."

[14] Cst. Lutz asked her if she had been injured in the accident and she said that she had a sore neck, but thought that was from work. She said she did not remember taking any liquor from her vehicle.

[15] After speaking with John Millsom in his vehicle, Cst. Lutz returned to the police vehicle and at 6:53 p.m. read the defendant the Breathalyzer demand. He repeated the *Charter* rights and again she said she did not want a lawyer.

[16] At 6:54 p.m. they left for the New Minas R.C.M.P. detachment, arriving there at 7:07 p.m. After searching her and allowing her to use the washroom, Cst. Lutz again advised her of her right to counsel and she again stated that she did not want to speak to a lawyer. He then took her to the breathalyzer room, where he prepared the instrument and, in his capacity as a breathalyzer technician, took the breath samples at 7:55 p.m. and 8:15 p.m., obtaining readings of 200 and 190 milligrams of alcohol in 100 millilitres of blood, respectively.

[17] On cross-examination he admitted that the tests were conducted more than two hours after she left her motor vehicle and explained that the breath tests were delayed because he broke a tube when he was preparing the instrument for the tests. As that was the last one at the detachment he had to get another one from Wolfville.

[18] He asked the defendant her age, weight and height and was told that she was forty-one years old, that her weight was 115 lb. and that she was 5'5" tall. He described her demeanour throughout as being "very talkative; friendly and drunk."

[19] He said he found two empty cans of beer in her car, which supported what she told him about her beer consumption; but she did not say and he did not ask her when or how much vodka she had consumed. She appeared to him to be sobering up between 6:30 p.m. and 9 p.m., when he drove her home.

[20] Elizabeth Dittmar, a toxicologist from the R.C.M.P. forensic toxicology lab in Halifax, was qualified by consent as an expert in, *inter alia*, the physiology of alcohol and drugs, i.e. their absorption, distribution and elimination in the human body. She testified that, based on the defendant's gender, and the readings obtained on the breathalyzer tests and assuming no alcohol consumed in the half hour before 5 p.m. or between 5 p.m. and the test, the defendant's blood alcohol concentration at 5 p.m. would have been between 223 and 258 milligrams of alcohol per 100 millilitres of blood. She testified that if the defendant had consumed one regular can of beer of 5% alcohol by volume after the accident and if that alcohol was entirely absorbed by the time of the test, the defendant's blood alcohol would have been between 185 and 229 milligrams percent. Finally, to give the maximum benefit to the defendant, subtracting 3 cans of beer from the readings on the assumption that she had consumed two cans of beer immediately before the accident close enough to it not to affect her blood alcohol concentration at the time of the accident and one can immediately after, her readings at the time of the accident would have been between 109 and 171 milligrams per cent.

[21] On cross-examination the following hypothetical question was put to Ms. Dittmar: if a female of the defendant's height, weight and age has the same breathalyzer readings as the defendant at the same times, but between 1:30 and 2:30 p.m. drinks one and one-half 355 mg. cans of beer containing 5% alcohol by volume, between 3 and 3:30 p.m. has another such regular can of beer, between 4:30 and 5 p.m. consumes one-third of a pint of vodka and between 5:30 and 6 p.m. has another beer, what would her blood alcohol concentration be at 5 p.m?

[22] Ms. Dittmar stated that the breath test results and the beer consumed after 5 p.m. would have no effect on her calculations. To give the benefit of the doubt to the individual, she assumed that the 1/3 pint of vodka would equate to 4.4 oz. of vodka of 40% alcohol by volume and that at most 2.2 oz of that would have been absorbed at 5 p.m. On that basis she calculated that the individual's blood alcohol concentration at 5 p.m. would have been between 23 and 101 milligrams per cent.

[23] On another hypothetical involving the same individual drinking the same amount of beer at the same times but having the motor vehicle accident at 4:30 and then consuming the same amount of vodka, Ms. Dittmar stated that her calculations put the blood alcohol concentration at 4:30 p.m. at between 13 and 65 milligrams per cent.

[24] The defendant testified that she went grocery shopping on the morning of March 20, 2004 and also got an eight-pack of beer in cans and a bottle of raspberry vodka.

She went home, had a light lunch and then went out to clean out her vehicle. She opened a can of beer to enjoy as she performed this chore. Her teenage son came out to the yard where she was working and argued with her. She said that he has an "impulse disorder" and that he became upset. He kicked her beer can over as he went back in the house, slamming the door. She said that she had consumed about half of that can, so she cleaned up the mess and opened a second beer.

[25] Her son continued to slam around inside the house and when he challenged her again, she said she grabbed her purse and left. By this time the second beer was empty and she tossed the can into the car.

[26] She thought that she left between 2:00 and 2:30 p.m. She was upset and decided on impulse to drive to Aylesford Lake where she once owned property. It was about a thirty-five minute drive, given the bad condition of the roads. She pulled over to the side of the road and parked where her property was, but she could not walk to the lake because of the snow. So she sat there, had another can of beer and a cigarette for not more than half an hour. She said that she started to "cool off" and she headed back home along the North River Road.

[27] As she drove, she was smoking a cigarette. On a sharp corner she went to put the cigarette out, and lost control of the car. She said that it pitch poled, tumbled, then rolled and ended on all four wheels in a snowbank in the ditch. She hit her head in the process.

[28] She said she sat there for a few minutes thinking about what she was going to do. She tried to start the car, but it would not start. She could not get out the driver's door; it was blocked with snow. She managed to get out the passenger side and inspect the car, then crawled back in through the passenger side. She then saw the vodka and began drinking. She estimated that she drank about a third of the bottle – about 3 drinks. She tried to start the car again and this time it started, although she could not move it. She sat there with the car running and then heard a knock at her window.

[29] She did not know either lady then, but was later told that one was Dr. Gallant and the other was Deborah Sawler. She remembered walking through deep snow to the road where Dr. Gallant asked her into her vehicle and gave her a blanket because she was shaking.

[30] Then John Millsom arrived and the defendant left Gallant's motor vehicle and asked Millsom to take her home. He agreed, but said that he had to stop at his place first and put his groceries away. She had a beer while he did this, and they talked about their sons, sharing their problems. He then took her home, stopping on the way to talk again and help her calm down about going home to her son. When they got to her home, Cst. Lutz arrived behind them.

[31] On cross-examination the defendant stated that the accident happened around 4 p.m. but admitted that when Cst. Lutz asked her how long the accident had happened before the witnesses showed up, she said that the two women did not see it happen, but arrived on the scene just afterward.

[32] On being questioned as to whether she did not have the vodka before the accident rather than after, she replied somewhat evasively that it was "not my recollection" that it was consumed before the accident.

[33] Following the defendant's testimony I allowed the Crown to recall Ms. Dittmar to correct an error in her testimony, subject to cross-examination by the defence. Ms. Dittmar then said that the range she had given in regard to the defence's first hypothetical was in error; rather than 23 to 101 milligrams per cent, the range should have been 42 to 113 milligrams per cent, having regard to the defendant's body weight of 115 lb.

Issue

[34] In light of the defendant's testimony as to her drinking pattern, has the Crown established beyond reasonable doubt that the defendant's blood alcohol concentration just prior to her leaving her motor vehicle was over 80 milligrams of alcohol in 100 millilitres of blood?

"Over 80"

[35] In this case, unlike many involving this issue, the Crown is not relying on the so-called presumption of identity, i.e. that the blood alcohol concentration stated on the Certificate is the same as the defendant's blood alcohol concentration at the time of last care and control. Instead, the Crown called expert evidence to relate those readings back to 5 p.m., the time the Crown alleges the accident happened. On the other hand, the defence admitted that the accuracy of the certificate is not in question. In other

words, the defence concedes and I find as a fact that the readings obtained and recorded in the certificate accurately reflected the defendant's blood alcohol concentration at the time of the tests.

[36] So, unlike many of these cases, neither the presumption under s. 258(1)(c) nor that under s. 258(1)(d.1) is in issue, and the case will be resolved simply on the basis of the test in *R. v. W(D)* as to whether or not the defendant has raised a reasonable doubt.

[37] The defendant testified in detail as to her drinking pattern that afternoon. Based on that drinking pattern as stated above, and without reference to the certificate, Ms. Dittmar calculated that at 5 p.m. the defendant's blood alcohol concentration would have been between 42 and 113 mg. per cent. Ms. Dittmar was not asked whether, or to what degree, that scenario conflicted with the results of the certificate, but it is to be noted that her calculations based on the certificate specifically excluded the defendant drinking anything in the half-hour before 5 p.m., which according to the defendant's testimony was exactly the time when she did her heaviest drinking.

[38] The case therefore boils down to the credibility of the defendant's statement on the stand that she drank the vodka between 4:30 and 5 p.m.

[39] As was stated in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CarswellOnt 80, 3 C.R. (4th) 302, 122 N.R. 277, 63 C.C.C. (3d) 397, 46 O.A.C. 352:

> A trial Judge might well instruct the jury on the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[40] I do not believe that the defendant drank the vodka between 4:30 and 5 p.m. for the following reasons:

1. she was upset by the confrontation with her son and obviously went to the lake to console herself; it makes sense that that is where she would have done her drinking;
2. although the road was icy and she says that stubbing out her cigarette contributed the accident, I find that the accident itself is some evidence that her ability to drive may have been impaired at the time;
3. her evidence on the stand that she sat in her motor vehicle and drank for half an hour or more before anyone arrived on the scene is contradicted by her statements to Cst. Lutz that Gallant and Sawler arrived just after the accident and that she had nothing to drink after the accident;
4. there is a large unexplained discrepancy between the blood alcohol concentration of 185 to 229 calculated back from the breathalyzer readings, which have been established to be accurate, and the blood alcohol concentration of 42 to 113 calculated forward from her drinking scenario;

[41] Although singly of varying weights, taken together the foregoing are sufficient for me not only not to believe the defendant, but to not be left in any doubt by her evidence as to when she consumed the vodka.

[42] I must then consider whether on the basis of the evidence I do accept, that of Ms. Dittmar's first set of calculations, I am convinced beyond reasonable doubt that the defendant's blood alcohol concentration at 5 p.m. was over 80 milligrams per cent.

[43] Ms. Dittmar's expert evidence establishes that, based on the certificate and subtracting the one beer she was seen to drink after that time, the defendant's blood alcohol concentration at 5 p.m. would have been between 185 and 229 milligrams per cent, assuming she had nothing to drink in the half-hour before 5 p.m.

[44] Given that neither the accuracy of the breath tests nor Ms. Dittmar's expertise has been disputed in any way, I am satisfied beyond a reasonable doubt that the defendant was in care and control of her motor vehicle while her blood alcohol concentration exceeded 80 milligrams of alcohol in 100 millilitres of blood.

Conclusion

[45] The defendant is guilty as charged under s. 253 (b) of the *Criminal Code*. A stay will be entered on the s. 253(a) charge.