PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Doucette, 2009 NSPC 64

Date: 20091021
Docket: 1921497-98
Registry: Kentville

Between:

Her Majesty the Queen

v.

Barrie Joseph Doucette

Judge:	The Honourable Judge Alan T. Tufts
Heard:	July 29, 2009, in Kentville, Nova Scotia
Written decision:	December 9, 2009
Charge:	253(b) C.C. 253(a) C.C.
Counsel:	Robert Morrison, for the Crown Robert Stewart, Q.C., for the defence

By the Court (orally):

[1] This is the matter of R. v. Barrie Joseph Doucette. Mr. Doucette was charged under s. 253(b) and s. 253 (a) of the **Criminal Code** and prior to the trial proceeding there was an application and hearing to determine the merits of Mr. Doucette's application for exclusion of evidence under s. 24(2) of the **Charter**.

[2] The defendant argues that his rights under s. 7 and 11(d) of the **Charter** have been violated and the evidence of the breath test results should be excluded. Particularly the defendant argues that because he was refused to be told the result of the first breath test the police failed to properly disclose the evidence against him which he argued they were obliged to do. Accordingly the police failed in its obligation to disclose the evidence against the defendant which the defendant argues is a fundamental principle of justice with which the police are obliged to comply.

[3] The defendant relies on *R. v. Selig* 27 N.S.R. (2d) 166, a decision of the Nova Scotia Court of Appeal.

[4] This application was by way of a separate hearing prior to the trial. I will review the underlying facts. The defendant was stopped by the police in a parking lot in Berwick, Nova Scotia and was asked to provide a sample of his breath for analysis after failing the approved screening device. He was then taken to the New Minas Detachment of the R.C.M.Police for that purpose. After providing one sample the defendant asked to be told the result. The officer refused. The officer testified that one needs two samples before the first sample is valid.

[5] The defendant opined that he may have called a lawyer if he knew the test result. The defendant had not spoken to a lawyer. The testing instrument that was used was the Datamaster C, an approved instrument. Unlike the Borkenstein Breathalyzer this device produces a ticket or slip indicating the result of any particular test. Eventually the defendant gave a second sample and was charged under s. 253(a) and (b) of the **Criminal Code** (the applicable **Code** sections at the time).

[6] The issue here is simply whether the refusal by the police to provide the defendant with the result of the first test or to look at the ticket constituted a breach

of the defendant's s. 7 and s. 11(d) rights under the **Charter**, particularly whether this action by the police breached the defendant's ability to make full answer in defence.

THE DEFENCE POSITION

[7] The defence argues that this issue has been decided by the Nova Scotia Court of Appeal in *R. v. Selig, supra* which the defendant says stands for the proposition that when requested the defendant is entitled to see the breath test results as they are produced unless that request would interfere with the testing procedure or the defendant otherwise dis-entitled himself to review the results.

[8] The defence argues that the defendant needed this information to better inform him as to whether to speak to counsel before providing a second sample and to properly scrutinize the police procedure.

THE CROWN'S POSITION

[9] The Crown argues that the decision in *R. v. Selig* should be distinguished. It argues that there are fundamental differences between the way the Borkenstein breathalyzer and the Datamaster C devices operate which makes the proposition in *R. v. Selig* inapplicable here. Particularly the Crown argues that unlike the Borkenstein breathalyzer the Datamaster produces at the time of testing a permanent record of the result. The reading was not a transitory positioning of a needle on a gauge. There is no issue here of recording the results accurately. Accordingly the Crown argues that the defendant's right to full answer in defence was not violated.

ANALYSIS

[10] As a general proposition the police are not required to share or disclose the results of their investigation until a suspect has been charged. There is no such obligation at the police station, see. *R. v. Crawford*, [1995] 1 S.C.R. 858 at ¶25. The ruling in *R. v. Selig* seems to be an exception to this. The Nova Scotia Court of Appeal found that using the results would have assisted the defendant in making full answer in defence:

> Unless the respondent was permitted to observe the gauge he would not be able to dispute the record prepared by the technician as the reading on the gauge was transitory. By viewing the gauge an accused may be able to address "evidence to the contrary".

The court pointed out that the accuracy of the reading could be challenged and a second officer could confirm it.

[11] In *R. v. Morse* (1993) 121 N.S.R. (2d) 416 (N.S.S.C.) following *Selig* reasoned that the reading on the gauge of the Borkenstein breathalyzer "would be gone forever once the qualified technician proceeds to take the next sample". The defendant who was present could easily view the reading and could therefore readily and easily verify the result which he could not realistically dispute later on.

[12] The authorities however are divided on this reasoning; see *R. v. Gillis* [1994] A.J. No. 454 (C.A.) which rejects the *Selig* analysis. See also *R. v. Chaisson*, [1996] N.B.J. No. 412 (Q.B.) and *R. v. Partington* [1992] B.C.J. No. 391 (S.C.) which both follow *Selig*. Of course the *Selig* decision is binding on this court.

[13] In my opinion the reasoning in *Selig* simply does not apply here. The results of a particular test are produced in a permanent record form. They are not transitory; they are not "gone forever" but are memorialized in the printed ticket. The test results are not subject to the subjective analysis of the technician who could possibly view the gauge or the testing device reading mechanism incorrectly. There is no area of dispute which could not be addressed later.

[14] While here the officer's reasoning for a refusal did not quite frankly make a great deal of sense–he said that the test was not valid until two samples were taken–this misses the point entirely, his failure to disclose the result does not, in my opinion, violate the defendant's ability to make full answer in defence. Each test result is subject to disclosure later on and its form and substance will be unchanged.

[15] The defendant argued that had he known the result at the time he would have called or contacted a lawyer. The defendant was entitled to call a lawyer in any event. He was entitled to receive legal advice as to his rights and obligations respecting the demand to provide breath samples. What the result of any particular test would be would not, in my opinion, affect his legal obligations and rights in

this regard. There may of course be strategic reasons why a suspect may wish to know this type of information but in my opinion he has no constitutional right to that information.

[16] There has been no authority referred to me which supports the proposition that a suspect is entitled to receive from police disclosure or information concerning the results of their investigation, particularly where the information is reduced to a permanent record prior to the suspect being charged.

[17] While I accept here that the defendant was genuine in his request for the information, that he was not trying to obstruct the police, the information could have easily been provided and that the reason not to give the result was not rational, the failure to do so was not in my opinion a violation of the defendant's s. 7 or s. 11(d) rights. Simply put the police do not have an obligation to provide that information and do not have to give a reason for the refusal to do so. At best the failure of the police to provide this information could possibly raise issues about the weight of the evidence–in this case the result. However, given that the result is reduced to a permanent record it is difficult to envision a situation where that may arise. The defendant's motion is therefore dismissed.

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A. TUFTS, J.P.C.