

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Mitton, 2007 NSPC 3

Date: January 29th, 2007

Docket: 1659008, 1659009

Registry: Halifax

Between:

Her Majesty the Queen

v.

Bradley Wayne Mitton

ORAL DECISION

Judge: The Honourable Judge Jamie S. Campbell

Heard: January 29th, 2007, in Halifax, Nova Scotia

Charge: Section 254(5) of the Criminal Code and Section 253(a) of the Criminal Code.

Counsel: Darryl Martin, Crown Attorney
Lisa Teryl, Defence Counsel

By the Court:

[1] Twenty-two year old Bradley Wayne Mitton took a calculated risk on the night of May 27, 2006. He would likely now agree that it was a risk that may not have been worth taking. He is now charged with failing to comply with a demand for a breath sample contrary to s. 254(5) of the Criminal Code and with having control of a motor vehicle while his ability to operate a vehicle was impaired by alcohol contrary to s. 253(a) of the Criminal Code. He faces the prospect of a criminal conviction. Once a driver takes the calculated risk involved in determining whether, having had something to drink, he is or is not impaired, there may be consequences that flow, ranging from fatal accidents to traffic stops and the series of events that led Mr. Mitton to where he is today.

Facts:

[2] That evening Mr. Mitton had gone to a birthday party at Kokomo's in Bayer's Lake. He stayed at the party for about two hours, from 8:30pm until 10:30pm. He testified that while at Kokomo's he bought three bottles of beer and

consumed two of them himself. He left to meet with his then girlfriend and some others on Church St. in Halifax.

[3] He left for downtown Halifax, intending to go to the Shoppers Drug Mart on Spring Garden Road before going to Church Street. He was driving a 1989 red Mustang, which is normally placed in storage for the late fall and winter months. In 2006 it had been put on the road around the first of May having had its transmission rebuilt over the winter.

[4] In the lower gears Mr. Mitton noticed that the transmission was not working as well as he had hoped. It was jumping and he was revving the engine to give it gas to prevent stalling. This was what initially attracted the attention of Constable Robert Tortola of the Halifax Regional Police. At 10:40 pm he noticed a red mustang two cars ahead of him revving its engine at the stop light at the Willow Tree intersection. He noticed that the vehicle was swerving in and out though it was not crossing over the centre line.

[5] He followed the vehicle down Bell Road and onto Sackville Street heading

toward Barrington St. The car turned right onto Dresden Row and Constable Tortola turned on his police cruiser's flashing lights to initiate a stop.

[6] The Constable noted that the driver did not immediately pull over but went a block and a half before coming to a stop. Mr. Mitton said that there were cars parked on both sides of the street and he stopped as soon as he found a place where he could stop safely.

[7] Constable Tortola asked Mr. Mitton for his licence and registration. He testified that he noted a strong smell of alcohol from Mr. Mitton who was the only person in the car. Constable Tortola noted as well that Mr. Mitton had considerable difficulty in producing his license and registration documents from his wallet.

[8] Mr. Mitton acknowledges that he may have briefly had some difficulty in getting one of the documents out of his wallet. He says that the corner had struck in his wallet and he was, not surprisingly, upset at the time.

[9] Constable Tortola asked Mitton if he had had anything to drink. Mr. Mitton

contends that he believed the constable to be asking whether he was drunk and answer no. When the constable told him that he could smell alcohol on his breath Mr. Mitton acknowledged that he had consumed a couple of beers.

[10] Constable Tortola directed Mr. Mitton to get out of his car and come to the police cruiser parked behind it. Constable Tortola testified that Mr. Mitton was slow to get out of the car. Mr. Mitton explained that the vehicle is low to the ground. Constable Tortola said that Mr. Mitton was unsteady on his feet and had to balance himself against the side of the vehicle to make his way back to the police cruiser. Mr. Mitton however says that Constable Tortola was shining a flashlight in his face making it difficult for him to walk. Constable Tortola did not believe he had a flashlight with him when making the stop.

[11] Mr. Mitton was read the police cautions, taken to the police station and given an opportunity to make a call to a lawyer.

[12] In the breathalyzer room at the police station he met Constable Blair Hickey who was to administer the Datamaster breathalyzer test. Constable Hickey noted that Mr. Mitton was exhibiting what he described as “the usual” signs of

impairment. He observed Mr. Mitton, in his interaction with Constable Tortola, to be argumentative and agitated. Constable Hickey however only observed Mr. Mitton through a clear plastic glass window prior to his going into the Datamaster room.

[13] Constable Hickey gave Mr. Mitton instructions as to how he should blow into the mouthpiece. He told him that he should blow until he was told to stop.

[14] The test commenced at 11:58 PM. On the first attempt Mr. Mitton put the entire mouthpiece in his mouth. He was then told to put the end of the mouthpiece in his mouth and blow until told to stop. He blew according to Constable Hickey for 4 or 5 seconds and stopped without prompting. That counted as the second attempt. He then did the same thing again. Constable Hickey pressed the “Y” button on the Datamaster at 12:01am, indicating a refusal. He could not recall whether Mr. Mitton was in the room when the “Y” button was pressed. Mr. Mitton was then charged.

[15] During the administration of the test Mr. Mitton did not place his tongue

over the mouthpiece, drop the mouthpiece or spit into it. He did not fail to make a proper seal or puff up his cheeks to make it appear as though he was blowing while he was not. Constable Hickey acknowledged that Mr. Mitton did provide samples but for a very short time.

[16] Mr. Mitton testified that he told the officer that he was running out of breath. Constable Tortola recalled that as well.

[17] Mr. Mitton indicated that he was so nervous that he felt he was going to faint. He said that he was not instructed on how long to blow. When he exhaled through his nose, he said that Constable Hickey became very upset and swore at him. When the next two attempts failed and he was told that he was being charged with refusal Mr. Mitton testified that he pleaded to be allowed to try again.

[18] Mr. Mitton was taken to a holding cell. After a few minutes he waived an officer down and asked to be moved into a private holding cell because he was nervous and scared. He was given release papers and began reading them. He testified that he was continually interrupted by Constable Tortola. He was then taken back to the cells and released the next morning.

Issues:

[19] There are two issues. The first is whether Mr. Mitton's conduct amounted to a refusal of the breath demand. The second is whether impairment has been proven beyond a reasonable doubt.

Failure or refusal:

[20] Section 254(5) makes it an offence to fail or refuse to comply, without reasonable excuse, with a breathalyzer demand made by an officer. Mr. Mitton at no point specifically refused the demand. The question is whether his actions constituted a failure to comply with the demand made by Constable Tortola.

[21] Mr. Mitton's shortness of breath was not presented as a reasonable excuse but as evidence of his lack of intent to fail to provide a sample. There are circumstances in which it is reasonable for a person to refuse to provide a breath sample. It is not necessary to enumerate them here. Here the question is whether

Mr. Mitton was actually trying to give a sample. It is for the Crown to prove that he was not.

[22] From the time the Datamaster was engaged until the test was terminated about three minutes had elapsed. Constable Hickey could not recall whether Mr. Mitton was in the room when the testing was terminated on the device itself.

[23] Mr. Mitton used none of the well worn tactics of those who seek to avoid the test by blocking the mouthpiece, spitting into the mouthpiece or pretending to blow. On the first attempt he put the entire mouthpiece in his mouth. That might be an understandable mistake when a plastic mouthpiece is taken from a sterile plastic wrap and one is told to put it in one's mouth.

[24] Mr. Mitton testified that he was instructed to breathe into the device. Constable Hickey recalls having told him to take a deep breath then to blow into the device. These are instructions that Constable Hickey has given many times. It is very unlikely that on this occasion he departed from his normal instructions.

[25] Equally however, when Mr. Mitton heard the words "deep breath" and

“blow”, in his agitated state he may well have not appreciated the distinction between breathing into the mouthpiece and blowing into the mouthpiece. He would not have to have been impaired by alcohol to have made that mistake.

[26] The proper use of the mouthpiece was not demonstrated to Mr. Mitton. He breathed into the device but stopped twice before being told to stop by Constable Hickey. Mr. Mitton said that he was running out of breath. He was nervous. This was his first experience with being stopped by the police and certainly his first involvement with the breathalyzer device.

[27] It was pointed out that while giving evidence he was also in a situation that was new to him and was out of his control yet he did not appear to be particularly short of breath. The experience of giving evidence in court can of course be an upsetting and unnerving experience. It is quite different in quality from being taken into the police station for the first time, at midnight, facing the prospect of a criminal charge and having no control over the situation and not knowing what will come of it, either in the immediate or longer term future. In court the witness may have the benefit of counsel, as was the case here, who can provide some indication of what can be expected and provide some indication as to the scope of potential

outcomes. The trip to the police station was, in Mr. Mitton's case, embarking into entirely uncharted territory.

[28] The more Mr. Mitton was convinced of his own innocence the more Kafkaesque the experience would be as he perceived it.

[29] It is not unreasonable to believe that Mr. Mitton was attempting to provide a sample and was not by his actions failing to do so. The brevity of the testing process, his own evidence as to his shortness of breath, the officers evidence as to his level of agitation and the real potential for a misunderstanding as to the instructions for properly providing a sample, support that interpretation.

[30] Furthermore, when he was told that he was being charged with refusal Mr. Mitton testified that he asked to be allowed to try again. The police officers could not recall that statement being made. Constable Hickey describes what happened as brief argument about whether a sample had been provided.

[31] Mr. Mitton adamantly asserted that he pleaded to be allow to take the test

again. Constable Hickey did not think that there had been any such plea but did recall a Mr. Mitton's asserting that he had provided a sample.

[32] Mr. Mitton did in fact provide a sample, but not one sufficient to do the test. He was not exhibiting the behaviours common to those who try not to give a sufficient sample in order to circumvent the test. His behaviour was consistent with one who wanted to provide a sample.

[33] Whether he asked to be able to take the test again or argued that he had provided a sample, this was not something that arose later as an afterthought, as a change of mind or a revised avoidance strategy. It happened immediately upon his being told that he was being charged with refusal. Whether it was a plea or an argument it was at least some indication that Mr. Mitton thought that he had provided a sample or that he should be able to try again to provide a sample. His actions at the time of the test and in the moments after the attempts were made to administer it raise a reasonable doubt as to his intentions.

[34] I find him not guilty of the offence under s. 254(5).

Impaired:

[35] The officers noted a number of indicia of impairment.

[36] Constable Tortola's attention was drawn to the red Mustang by the revving of the engine and it's swerving on the street. The constable's decision to make the stop was in no way arbitrary or improper. He was entitled to make the stop and investigate.

[37] Mr. Mitton explained the revving of the engine as dealing with a mechanical problem he had been experiencing. It may also have been the effects of a spring night in downtown Halifax on a young man with a sports car. It is not the kind of driving that necessarily leads one to the conclusion that the driver is impaired.

[38] With respect to the swerving, Constable Tortola noted that the swerving was within the proper lane. Mr. Mitton's vehicle was not crossing the centre line and he was committing no motor vehicle offence. Once again this behaviour is not the kind of driving that leads toward the conclusion that the driver is impaired. No

mechanical explanation was put forward . Mr. Mitton frankly acknowledged that he could have been swerving but as he recalled he was not.

[39] Constable Tortola noted that when he initiated the stop it took Mr. Mitton a block and a half to come to a full stop. Mr. Mitton said that he was looking for a safe place to stop. On Dresden Row the area from Sackville Street to Spring Garden Road is broken up by a small intersecting street, Artillery Place. While Mr. Mitton may have driven a block and a half before coming to a stop it was not through a major intersection. Because of the intersecting Artillery Place it was indeed technically a block but hardly any great distance.

[40] Mr. Mitton's driving was in all other respects conceded to be normal. He was traveling at the normal rate of speed and was not committing any Motor Vehicle Act violations. His driving, in and of itself, was not significant evidence of impairment. In fact, his route from the Willow Tree to Dresden Row required him to make a number of turns and use the proper directional signal. Constable Tortola took no note that Mr. Mitton failed to comply with any of those requirements.

[41] Mr. Mitton was observed by Constable Tortola to have the smell of alcohol

on his breath. That is evidence of impairment but is certainly not conclusive in itself, nor was it argued to be. It is evidence that the person has consumed alcohol which in this case was readily conceded.

[42] Constable Tortola said that Mr. Mitton's eyes were bloodshot and watery. In his notes however, he indicated that they were watery but not bloodshot. Both are properly indicia of impairment. One must question why the officer would record one but not the other then in evidence make reference to both.

[43] When initially approached Mr. Mitton was asked whether he had had anything to drink. He said that he had not. Only when Constable Tortola told him that he could smell alcohol on his breath did he concede that he had been drinking. Mr. Mitton's explanation is that he believed that the officer was asking if he was drunk. Even at the young age of 22 this appears to be a misinterpretation that pushes the limits of naivete. The denial that he had been drinking might be more accurately characterized as an exercise of poor judgement than a reflection of any naive misinterpretation of the question.

[44] The denial is some evidence to support the view that Mr. Mitton was

anxious and believed at that moment that he had something to hide. It is some evidence of impairment.

[45] Mr. Mitton was asked for his licence and registration. Constable Tortola said that he had difficulty in producing those. His hands were shaking and he had trouble getting the papers from his wallet. This was not for an extended period but only a momentary delay. Mr. Mitton's shaking hands are not inconsistent with his description of his level of nervous anxiety at time. He was scared. He knew he had had something to drink and knew that he was being stopped by the police. It is not unreasonable to believe that in that situation he would have some difficulty in extracting the documents from his wallet, much like an entirely sober person fumbling to remove a debit card from a wallet at the head of a long and impatient line of other grocery store customers.

[46] Constable Tortola testified that when he asked Mr. Mitton to walk back to the police cruiser, Mr. Mitton took some time getting out of the car and then was unsteady on his feet needing to balance himself on the side of the car.

[47] The car itself is lower than most. Mr. Mitton contends that Constable Torola

was shining a flashlight in his face making it difficult for him to walk having got out of the car. Constable Tortola did not administer a sobriety test at the time of the stop. In other words, Mr. Mitton was not asked to walk in a straight line. The officer said that it was not his normal practice to use a flashlight on such a stop. Constable Tortola was fair and frank in his testimony stating only that he could not recall shining a flashlight in Mr. Mitton's face.

[48] Constable Tortola testified that Mr. Mitton was experiencing mood swings during the course his time with him. This is one of the indicia of impairment. Constable Tortola described Mr. Mitton has being on the verge of crying and becoming more and more agitated, not engaging in conversation and give very short curt answers. There was no evidence that Mr. Mitton was swinging from jovial to morose. As Mr. Mitton described it, he believed he had done nothing wrong and was very upset at the circumstances in which he found himself. He was angry at how he believed himself to be being treated and was scared at the prospects that confronted him. As the process continued it is understandable that he might become more agitated and more afraid.

[49] Constable Hickey observed what he called the "usual" signs of impairment.

That observation is not one that carries a great deal with it. It is impossible to tell whether the officer was recalling what he observed from this event or what he believed he observed based on his experience. Upon concluding that a person is drunk it is natural to assume in retrospect that the usual signs of impairment were present.

[50] Mr. Mitton was kept overnight and not release until the morning. The fact that he was kept is no more evidence of impairment than the fact that he was charged. His inability to understand the release papers is consistent with his high level of anxiety.

[51] The issue here is whether there exists a reasonable doubt as to whether Mr. Mitton was impaired. The question is not whether he was intoxicated and not whether his level of impairment was equal to that which it might have been had he had a blood alcohol level over the legal limit. The question is whether he was impaired to any extent.

[52] Mr. Mitton says that he had only two drinks. Against that the Crown has

offered indicia of impairment. When those indicia are attempted to be explained away by a serious of coincidences or when they cannot be explained at all, the inferences lead strongly toward the conclusion that the person was impaired. Here, there are no such string of improbable coincidences. Mr. Mitton's version of events, which I accept in part, provides an explanation for the indicia of impairment sufficient to raise a reasonable doubt.

[53] His driving was not particularly remarkable. He had been drinking and had the smell of alcohol on his breath. His lack of coordination in getting out his documents was not serious and is consistent with his level of upset in the circumstances. His slowness in getting out of the car was also not pronounced and in any event is consistent with the sports car he was driving.

[54] His lack of stability on his feet may have been attributable to the a flashlight shining in his face. His behaviour which may not have been admirable in the circumstances is consistent with the behaviour of a 22 year old young man who is convinced of his innocence and who feels like he is being caught up in a situation that is out of his control. His watery eyes, while also one of the indicia of impairment might also have been a sign of the degree of upset he was facing.

[55] Mr. Mitton's version of events does not rely on a remarkable confluence of coincidences but could reasonably be an accurate description of circumstances in which a young man's fear, anxiety and lack of mature judgement took over.

[56] I am not satisfied that the case against Mr. Mitton on the impairment charge has been proven beyond a reasonable doubt and find him not guilty.

Judge Jamie S. Campbell

