**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** R. v. Levy, 2007 NSPC 79

**Date:** 20070612
**Docket:** 1680503, 14680504
**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Matthew Levy

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| **Judge:** | The Honourable Judge Alan T. Tufts |
| **Heard:** | May 28, 2007, in Windsor, Nova Scotia |
| **Written decision:** | October 30, 2008 |
| **Charge:** | 253(a) CC<br>253(b) CC |
| **Counsel:** | William Fergusson, Q.C., for the Crown<br>David Barrett, agent, for the defence |

**By the Court** :

[1] Matthew Frederick Levy has been charged under s. 253(a) and (b) of the **Criminal Code**. Prior to the commencement of the trial the court heard a *voir dire* to determine the admissibility of certain evidence. The defendant is alleging a violation of s. 8 of the **Charter of Rights and Freedoms.** The defendant applies to exclude evidence of the result of an analysis of samples of his blood made after a blood demand given to him following a motorcycle mishap near Mount Uniacke, Nova Scotia.

[2] The defendant alleges the police had no reasonable and probable grounds to make the demand and therefore the blood was taken without legal authority which, the defendant argues, constituted an unreasonable search and seizure and therefore violated s. 8 of the **Charter**. The defendant also argues he was not properly given his **Charter** right to counsel.

[3] The defendant has the burden in this application. It is on the balance of probabilities. With respect to the second issue it is without merit. The defendant and his girlfriend, who both testified, were unclear about the sequence and details of the events. The girlfriend was not present when the rights to counsel were given and in any event the defendant's evidence seems concocted. It did not accord with the preponderance of probabilities given the surrounding circumstances. His evidence in this regard is rejected. The officer's evidence is clear on this particular issue, at least, and I accept that the right to counsel was given properly.

[4] The second issue has more substance. The officer testified that when she arrived the defendant was still on the roadway on a "board". She spoke to him to get some preliminary details. She made no observations about alcohol consumption or impairment. She spoke to him again in the ambulance while at the roadside and before the ambulance left for the hospital. She said she noticed the smell of alcohol. The defendant said he told the police he had drank earlier in the day. She made no other observations of impairment to operate a motor vehicle by alcohol. When asked in her examination-in-chief what her grounds were to make the blood demand she replied, "He had alcohol in his blood." When pressed by the crown

attorney she said she believed the defendant had been operating a motor vehicle, a motorcycle.

[5] When specifically directed to address the issues of impairment she said, “Because of the accident” and the fact that there was no apparent reason for it. She made some reference to the motorcycle falling in the face of oncoming vehicles although she gave no basis for this remark. The police officer’s testimony seemed to be focussed primarily on the presence of alcohol rather than impairment. Again when examined on the grounds she said, in cross-examination, “I formed the opinion he had alcohol in his blood.” Finally she said, “His speech was fine.”

[6] I will now review the law relating to this issue. Requiring a person to provide a bodily substance, for example blood, without prior judicial authorization is a warrantless search and seizure. A warrantless search and seizure is *prima facie* unreasonable and a violation of s. 8 of the **Charter**, see **R. v. Dennis** [2006] A.J. No. 1460. A warrantless search and seizure can be reasonable if it is authorized by law, the law is reasonable and the search and seizure is carried out in a reasonable manner, see **R. v. Collins** (1987) 33 C.C.C. (3d) 1 (S.C.C.). The demand for blood samples from suspected impaired drivers is authorized by law, s. 254(3) of the **Criminal Code**, provided the police officer making the demand has the reasonable and probable grounds to believe that the suspected person has committed an offence under s. 253 of the **Criminal Code** within the preceding three hours.

[7] The defence argues that the required grounds were not present here to give the police officer the legal authority to make the demand. The defendant does not argue that the law is not reasonable nor that the search and seizure was not carried out in a reasonable manner. The defendant simply argues that the police officer did not have reasonable and probable grounds to believe his ability to drive was impaired by alcohol or drug or that his blood alcohol level exceeded the legal limit. The defendant bears the onus to show that there was no legal authority.

[8] Reasonable and probable grounds for making a blood demand, as with a breath demand, has both a subjective and objective component, **R. v. Bernshaw** [1995] 1 S.C.R. 254. It must be based on facts known or available to the police

officer at the time she formed the requisite belief, **R. v. Oduneye** [1995] A.J. No. 632 (Alta. C.A.) It is whether the belief is reasonable, or accurate, which is important, **R. v. Masurichan** 56 C.C.C. (3d) 570. The belief can be based on hearsay and even be a misconception of the actual evidence, **R. v. Cuthbertson** [2003] A.J. No. 800. Reasonable and probable grounds has been described as "credibly based probability" – **R. v. Censoni** [2001] O.J. No. 5189. It is not proper to test individual pieces of evidence because it may be possible to explain away or rationalize each, **R. v. Todd** [2007] B.C.J. No. 892. Individual indicia of impairment should not be examined, **R. v. Huddle** [1989] A.J. No. 1061 (C.A.). The test requires an examination of the totality of the evidence as to the indicia of impairment, see **R. v. Andrea** 2004 NSCA 130.

[9] It is not an onerous threshold—I refer to **R. v. Censoni,** *supra* where Justice Hill gave a very complete review of the law in this area. It is not proper to measure the evidence as if it was a trial, **R. v. McClelland** 98 C.C.C. (3d) 509 nor is it necessary to establish a *prima facie* case for impaired driving, **R. v. Lanthier** [2006] O.J. No. 4939, **R. v. Storrey** 53 C.C.C. (3d) 316 (S.C.C.). Something less than what is required for a committal to trial following a preliminary inquiry is all that is necessary. It is a question of fact. Also, the test is not as exacting as in other situations where reasonable and probable grounds are required such as the issuance of a search warrant.

[10] In my opinion the officer only had a suspicion or belief that the defendant had consumed alcohol or had "alcohol in his blood", to use her words. She had no other basis for grounds to believe that he was probably impaired other than the accident. She did not witness the accident nor did she relate anything that she was told by anyone about the accident which would cause her to believe it supported her opinion the defendant was impaired. In fact, the defendant told her he slipped on loose gravel.

[11] The test is an objective one, ultimately. It is whether there is sufficient basis for a reasonable person to conclude that the defendant was probably impaired to operate a motor vehicle by reason of alcohol. Impairment under s. 253 requires only slight impairment. The smell of alcohol is not by itself sufficient. The fact that

there was an accident is not sufficient in my opinion. In this case the whole of the evidence needs to be examined, not simply individual indicia. However, in this case the objective analysis of the evidence does not support the required ground. The smell of alcohol and the accident is not sufficient, especially when the smell was not described with any adjectives such as strong or overwhelming and especially when she spoke to him inside and outside the ambulance. No other indicia were present. The officer had no information about how the accident occurred or the driving prior thereto, at least there was no evidence she obtained such information.

[12] The officer did not have the necessary grounds for the demand. She had no more than a suspicion based on the smell of alcohol. I am supported in my conclusion, in my view, by the officer's own testimony. As I mentioned earlier she repeatedly said, "I formed the opinion he," that is the defendant, "had alcohol in his blood." She said this in direct and again in cross-examination. It is only when pressed by the crown attorney to direct her mind to the required grounds did she express the opinion he was impaired.

[13] I am mindful that the opinion of an experienced police officer as to impairment is evidence which the court can accept and rely on, **R. v. Graat** [1982] 2 S.C.R. 819, but the court is not required to accept that opinion, **R. v. Sheppard** [2007] S.J. No. 199 (C.A.). In this case I do not accept her opinion, for the reasons just stated. I had the clear impression that her belief only amounted to a suspicion of the presence of alcohol, not impairment, enough for a screening test or sobriety test, but not for a breath or blood demand.

[14] The Crown relies on four cases, **R. v. Garrett** [2000] O.J. No. 1620; **R. v. Macsuga** [2005] O.J. No. 1061; **Saulnier** [1990] B.C.J. No. 161 and the **Andrea**, *supra*. Each of these cases can be distinguished, in my opinion. In **Garrett** there was noticeable odour of alcohol. The defendant's speech was indiscernible and he was constantly pacing. A police officer observed the defendant over a period of time and smelled alcohol when he spoke. The court concluded that the alcohol may have accentuated his distraught condition. These indicia, albeit not particularly strong, were much more than was present in this case.

[15] In **Andrea** the court identified the speed, the rolling stop through the flashing lights, odour of alcohol, fumbling papers, glossy eyes, large pupils, thick-tongued speech–all considerably more indicia than is present here.

[16] In **Saulnier** again there was more indicia: watery and bloodshot eyes, diluted pupils, reddening around the eyes together with the moderate odour of alcohol. All of this was in the context of a single car accident–again much more indicia than in the present case.

[17] Finally, in **Macsuga**, the defendant had slurred speech, a flushed face, watery, glazed and bloodshot eyes and dilated pupils together with a strong odour of alcohol. This is considerably more indicia than in the present case.

[18] The demand here, in my opinion, was not properly made. The blood samples were taken pursuant to an improper demand and therefore constituted an unreasonable search and seizure and a s. 8 violation.

[19] On the s. 24 application I am satisfied that the evidence should be excluded. The evidence is conscriptive and affects trial fairness. It is a serious violation of privacy in that bodily samples are held to demand a high expectation of privacy and that the balance between exclusion and inclusion would favour exclusion. So the evidence is excluded and I understand the Crown is offering no further evidence, so [the defendant] is found not guilty on both counts, there clearly being no basis for the s. 253(a) charge.

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Alan T. Tufts, J.P.C.