

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Buck, 2008 NSPC 67

Date: 20081105

Docket: 1837125 & 1837126

Registry: Bridgewater

Between:

R.

v.

Ryan Allen Vincent Buck

Judge: The Honourable Judge Anne E. Crawford

Heard: June 2, 2008, in Lunenburg, Nova Scotia and
August 21, 2008, in Bridgewater, Nova Scotia

Charge: s. 253(a) of the *Criminal Code of Canada*
s. 253(b) of the *Criminal Code of Canada*

Counsel: Mr. Paul Scovil, for the Crown
Mr. Alan Ferrier, for the defence

By the Court:

[1] Mr. Buck is charged under ss. 253(a) and (b) of the *Criminal Code* with impaired driving and driving with a blood alcohol level over the legal limit. The matter proceeded as a *Charter voir-dire* on the issue of an alleged violation of the defendant's right to counsel of choice.

Issue

[2] Did the police violate the defendant's right to counsel of choice under s. 10 (b) of the *Charter of Rights*?

Facts

[3] This decision will deal only with the facts relevant to the *Charter* issue.

[4] The incident leading to these charges occurred in the early morning hours of October 27, 2007. At that time Cst. Gallant of the Bridgewater Police Service arrested the defendant for impaired driving and read him his *Charter* rights and the police warning.

[5] Although the defendant testified that he repeatedly asked to speak to local criminal lawyer Alan Ferrier on the way back to the police station, I find that I can place little reliance on his testimony. He admitted that his consumption of alcohol probably affected his memory of what transpired on that evening, and his recollection of the reading of his rights reflected more familiarity with the American "Miranda" warning as seen on American TV police dramas than actual recollection of what was read to him. His recall of other events, such as when the breathalyzer demand was read to him and what duty counsel told him (just to "keep his mouth shut") was incomplete and confused. I am satisfied, however, that at the police station he did clearly request to speak to Mr. Ferrier.

[6] Cst. Gallant attempted to comply with his request by pointing to Mr. Ferrier's number listed on the wall of the phone booth to which he had led the defendant. He then closed the door and allowed the defendant auditory privacy while he dialled the number.

[7] The defendant, however, almost immediately opened the door and told Cst. Gallant that the number was disconnected.

[8] Cst. Gallant himself dialled the number and got the same disconnect message or signal.

[9] At this point, Sgt. O'Quinn, who was the breathalyzer technician on duty at the time, intervened. According to Cst. Gallant, the Sergeant directed him to call duty counsel for the defendant. The defendant recalled Cst. Gallant making a comment that Mr. Ferrier would not pick up the phone at 3 a.m. Sgt. O'Quinn admitted that he was the one who initiated the conversation regarding duty counsel and that he could have commented that the defendant would not get Mr. Ferrier at three o'clock in the morning. All three witnesses are in agreement that no further efforts were made to contact the defendant's counsel of choice.

[10] Duty counsel was dialled and the defendant spoke to Shaun Brown of Nova Scotia Legal Aid. The defendant waived privilege and Ms. Brown testified that she spoke first to Cst. Gallant and obtained details as to the charge, whether or not there had been a motor vehicle accident and plan for release. She then spoke to the defendant and asked him the same questions. She then advised him regarding the breath sample process and that if he did not comply he could be charged with the offence of refusal. She was relying on her notes, and had no independent recollection of the conversation, but said that if the defendant or the police officer had made any comment or request for counsel of choice, she would have noted it and would have inquired as to what efforts had been made to contact counsel of choice, as she would not want to be in the position of offering legal advice to someone who wanted another lawyer.

[11] The police and the defendant are in agreement that following his phone conversation with Ms. Brown, the defendant made no further request to speak to Mr. Ferrier and agreed to provide breath samples.

Law

[12] I recently reviewed the law on this issue in *R. v. Collicutt*, 2008 NSPC 45, in which I adopted the reasoning of D.S. Ferguson, J. in *R. v. Blackett*, [2006] O.J. No. 2999, 2006 CarswellOnt 4585 as follows:

29 It appears to me that the caselaw dictates this three stage analysis of these s. 10(b) "right to counsel of choice" situations:

(a) Did the police fulfil their duty to act diligently in facilitating the right of the accused to consult counsel of choice? If the trial judge finds they fulfilled their duty then there is no breach of s. 10(b).

(b) If the police did not fulfill their duty then there are two possibilities:

(i) If the police breached their duty because they took no step to facilitate the right to counsel, then a breach of s. 10(b) is established: *Kumarasamy*.

(ii) If the police breached their duty because they made some effort but it is found not to constitute "reasonable diligence", the trial judge must next decide whether the accused fulfilled his or her duty to act diligently to exercise the right to counsel. If the answer is yes, then a s. 10(b) breach is made out. If the answer is no, then this trumps the breach of duty by the police and there is no breach of s. 10(b): *Brydges*; *Richfield*.

(c) If a breach of s. 10(b) is established the court must then go on to consider whether or not to exclude the consequent evidence under s. 24(2). The conduct of the accused is a factor which the court can consider: *Tremblay*; *Richfield*. The court in *Richfield* suggested that the threshold for exclusion is higher in breathalyzer cases: at para. 18.

[13] In applying the foregoing analysis to the facts in the present case, I note that, in contrast to the facts in *Collicutt*, the police officers here made no effort beyond dialling a disconnected number to contact the defendant's counsel of choice. The phone book was not consulted at any point. Also, in contrast to attempting to locate a number for a Halifax lawyer on a summer Sunday afternoon, it would have been an easy matter, within Sgt. O'Quinn's personal knowledge, to obtain Mr. Ferrier's home telephone number and dial it, with reasonable certainty that, at 3 a.m., it would be answered in some fashion.

[14] Nor was the defendant here even given an opportunity to decide whether he wanted to call duty counsel or not. That choice was taken from him when Sgt. O'Quinn directed Cst. Gallant to call duty counsel.

[15] I therefore find that the police did not fulfil their duty to act diligently in facilitating the defendant's right to counsel, nor did what they did constitute "reasonable diligence".

[16] As to whether or not the defendant acted diligently in exercising his right to counsel, I find that he did so, until the disparaging remark as to Mr. Ferrier's availability at 3 a.m. discouraged him from further efforts.

Conclusion

[17] The defendant has established a breach of his s. 10(b) right to counsel.

[18] As counsels' briefs did not address at any length the consequences of this breach under s. 24(2) of the *Charter*, I will give them an opportunity to do so, if they wish, before deciding that issue.