CANADA
PROVINCE OF NOVA SCOTIA

Case No. 688584, 688585
Date, 20010724

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

PHILIP H. HILTON
(Cite as: R v. Hilton, 2001 NSPC 20)

DECISION

HEARD BEFORE:	**The Honourable Judge C. H. F. Williams , JPC**
PLACE HEARD:	**Halifax Provincial Court**
IN THE MATTER OF:	**Criminal Code 253(b), 253(a)**
COUNSEL:	**Mr. D. MacRury, Crown Attorney** **Mr. D. Weir, Defence Attorney**

Cite as R v. Philip Hilton 2001 NSPC 20

R v. HILTON

Delivered orally July 24th, 2001
The Honourable Judge C. H. F. Williams , JPC

Counsel: Mr. D. MacRury, Crown Attorney
Mr. D. Weir, Defence Attorney

Introduction

The defendant, Philip H. Hilton, stands charged that on December 11, 1996 in the Halifax Regional Municipality he had a blood alcohol concentration that exceeded the legal limit when he operated a motor vehicle. In addition, the police have charged him with the control of a motor vehicle when his ability to do so was impaired by alcohol or drug.

Finding of facts

The following are my findings of facts. On December 11, 1996, the police were operating a roadside checkpoint in the Herring Cove area of the Halifax Regional Municipality. The defendant was stopped at 2353 hours and the police read to him an SL-2 demand at 2356 hours. At 2358 hours the instrument registered a "Fail" and, at 2359 hours, the police read to him the Breathalyzer demand. The prisoner transport wagon arrived on the scene at 0018 hours and transported the defendant to the Gottingen Street Police precinct where they arrived at about 0028 hours. They gave the defendant the opportunity to telephone counsel at 0042 hours which he concluded at 0046 hours. The Breathalyzer Technician, Constable James Wasson, took a sample of the defendant's breath at 0100 hours that gave an analysed reading of 210 milligrams of alcohol in 100 millilitres of blood. The defendant gave a second breath sample at 0118 hours that gave an analysed reading of 200 milligrams of alcohol in 100 millilitres of blood. A Certificate of a Qualified Technician was completed and a copy was served on the defendant, at about 0125 hours, by Constable Michael St. Pierre.

Issues

The defendant contends that the Breathalyzer tests were not administered "as soon as practicable." In addition, he contends that there is no evidence to support the Crown's assertion that a "copy" of the Certificate of a Qualified Technician, tendered as Ex.1, was in fact served on him.

Analysis

First I should note that, at trial, the defendant called no evidence on his behalf and neither was the Crown's only witness cross-examined. In argument, however, counsel for the defendant submitted that the nineteen minutes from 2359 hours, the time that the police gave the Breathalyzer demand to the defendant, to 0018 hours, the time they transported him from the roadside stop, the police gave no explanation for how that time period was expended.

On the evidence that I accept, it was a roadside checkpoint stop that occasioned the detention and arrest of the defendant. On the evidence, another police vehicle was summoned to transport the defendant to the police precinct. Applying the principles expressed by this court in ***R.v. Thorburn*** [2001] N.S.J. No.108, 2001 NSPC 3, I respectfully conclude that on the evidence before me there is "the presumption of regularity as to the reasonable and lawful utilization of time" that has not been displaced. The defendant was stopped. He was given the SL-2 test which he failed. Then, he was given the breathalyser demand and had to wait to be transported to the police precinct to take the breath test. On the evidence, there is nothing said about this police practice or procedure for another vehicle to transport stopped suspects from a roadside check stop that would, on the balance of probabilities, raise a reasonable doubt that, in this case, the delay was unreasonable or improper.

Therefore, when I balance the total evidence, in the light of ***Thorburn***, *supra.* , I am satisfied that the nineteen minutes wait to be transported to the police precinct, in the circumstances of this case, was neither an unreasonable nor an inordinate delay. I also bear in mind that the first breath sample was taken within two hours from the time he was first detained. As a consequence I conclude and find that the breath samples were taken "as soon as practicable."

Exhibit 1, the Certificate of a Qualified Technician was tendered and admitted pursuant to **Criminal Code** s. 258 (7). On the evidence the samples were taken pursuant to a demand and the Certificate is in proper form. There is no objection to the Certificate being admitted. What is being challenged is that the officer did not testify to the fact that he compared the original document to the document which he served on the defendant to ensure that they were duplicate copies of each other and that the document served was accurate. As the Crown did not establish that fact, the defendant submitted that reasonable doubts arise as to whether in fact the defendant did receive an actual true copy of the original document, Exhibit 1. Consequently, according to the defendant, the Crown cannot rely upon the Certificate as it has not satisfied the requirements of ***Criminal Code*** s.258(7). The defendant relies upon ***R. v. Laing*** 1998 Carswell Sask 229, 1166 Sask. R.126, [1998] 3 W.W.R.825 (Q.B.).

The Crown submitted that it has established a prima facie case which the defendant did not challenge through cross-examination. As the evidence of Constable St.Pierre is presumed to be true and as it was not challenged that is the only evidence before me concerning the defendant's receipt of a copy of the Certificate pursuant to ***Criminal Code*** s. 258(7). That evidence is uncontradicted and, if believed, it satisfies the ultimate threshold of proof beyond a reasonable doubt. The Crown relies upon ***R v. Pederson***, [1974] 1 W.W.R.481, 15 C.C.C.(2d) 323 (B.C.S.C.), and ***R v. Morgan*** (1995), 104 C.C.C. (3d) 342, 136 Nfld & P.E.I.R. 205, 18 M.V.R. (3D) 287 (Nfld. C.A.).

With respect to the establishing of a prima facie case, in addressing the issue of a directed verdict, which is analogous to the defendant's position, this court opined in ***R v. Breen***, [2001] N.S.J. No.257, at para. 13:

> If there is some admissible direct evidence on all the constituent elements of the offence that is capable of supporting a verdict of guilt beyond a reasonable doubt that will be sufficient evidence to put the accused to answer the case against him. If the evidence does not establish a threshold reliability of guilt, the sufficiency test, then it is impossible for it to meet the ultimate reliability standard, proof beyond a reasonable doubt. As at this stage I do not weigh the evidence or assess the credibility of the witness her testimony is presumed to be true and on the threshold reliability standard if she presents some admissible direct evidence on all the constituent elements of the offence her testimony would satisfy that standard.

In addition this court, with respect to the testimony of witnesses, opined in ***R. v. C.R.B.*** [1999] N.S.J. No. 217, at para 11:

> ... Overall, it seems to me that a witness' testimony is considered true until there is some particular reason to doubt it. Doubts may arise from the inherent unreasonableness of the testimony itself. Doubts may also arise from the cross-examination of the witness. Such cross-examination may show that a fact is incredulous because of commonsensical inaccuracies that reveal obvious errors. In addition, extraneous evidence, or lack of it, may point to errors or inaccuracies in a witness' testimony and if never corrected to rehabilitate the credit of the witness that testimony would have little or no probative value.

Here, the Constable stated in his evidence-in-chief that he handed a copy of the Certificate to the defendant. That, in my opinion, is prima facie evidence that it was an accurate copy. Here, he was not challenged as to the accuracy of the document that he gave to the defendant. Here there was no evidence led to challenge or to impugn the reliability of the Constable's testimony that he, in fact, gave an "accurate" copy of Exhibit 1 to the defendant. There is no argument that the defendant did not receive a document from the police who at the time of receipt informed him what it was. That is not denied. Further, there is no argument that the defendant did in fact receive from the police after the Breathalyzer tests a document that was presented to him as a copy of the test results. That also, is not denied. Further, when I examine the form, Exhibit 1, I note that there are notations on it that state "WHITE: Investigator YELLOW: Crown Prosecutor PINK: Accused". The colour of Exhibit 1 is white. Thus, there is a reasonable inference that Exhibit 1 is part of a set of three copies. In addition, the Constable testified that he was present when the samples were taken by the Technician. The Certificate was completed by the

Technician who then gave it to him and, he , in turn gave a copy to the defendant. Therefore, in the circumstances of this case, in my opinion, to require the Constable to compare the forms that appear to be preprinted is needlessly technical. ***Morgan***, *supra.* , at p.345:

In my opinion, the Crown has made out a prima facie case concerning the accuracy of the document that the police gave to the defendant. There is admissible direct evidence, which I accept, that the police gave to the defendant a copy of the Certificate. The presumption is that it is an accurate copy. That presumption has not been challenged, in evidence, by the defendant. Thus, the Constable's testimony in my opinion, satisfies the threshold reliability standard of the sufficiency of evidence to put the defendant to answer the case against him. On this point, in ***Pederson***, *supra*. , a case interpreting ***Criminal Code***, s.258 (7), Berger J., stated at p.235:

> While it may be sufficient for a witness to say in his evidence-in-chief simply that he handed a copy of the certificate to the accused -- that would be prima facie evidence that it was an accurate copy -- it would be necessary for that witness, or for some other witness for the Crown, to be in a position to swear to its accuracy, if the defence were to challenge him on the point. That is not too much to ask.

Consequently, when the Constable's assertion remains unchallenged through cross-examination, other testimony or "evidence to the contrary," it is presumed to be true. Accordingly, left unquestioned, it satisfies the ultimate reliability standard of proof beyond a reasonable doubt that the defendant did receive an accurate copy of the Certificate. I so find.

I am satisfied that the defendant received the required notice pursuant to ***Criminal Code*** s.258(7) and accordingly, the Certificate, Exhibit 1, is receivable in evidence against the defendant. It therefore follows, in my opinion, that the Crown can rely upon the presumptions stated in ***Criminal Code*** s. 258(1) (c), (e), and (g). In the result, I am satisfied that the Crown has proved beyond a reasonable doubt that the defendant's blood alcohol concentration exceeded the legal limit when he was operating a motor vehicle. In the result, I find him guilty of the offence, as charged under
Criminal Code s.253(b).

I now refer to the impaired driving offence. There is no evidence as to the manner of driving of the defendant. There is no evidence to show that his driving was out of the ordinary or deviated from the norm. Consequently, when I consider the total evidence in the light of cases such as ***R v. Stellato*** (1993), 78 C.C.C. (3d) 380 (Ont. C.A..), ***R v. Andrews***, [1996] A.J. No. 8 (C.A.), ***R v. Hill***, [1999] N.S.J. No.276, and ***R v. Lozano***, [1997] N.S.J. No. 581, I am not satisfied, on the evidence adduced, that the Crown has proved beyond a reasonable doubt that the defendant's ability to operate a motor vehicle was impaired by alcohol or drug. I therefore find him not guilty as charged under ***Criminal Code*** s.253 (a).