

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Comeau, 2009 NSPC 48

Date: 20090603

Docket: 1927626 & 1927627

Registry: Kentville

Between:

Her Majesty the Queen

v.

Kevin Peter Comeau

Judge: The Honourable Judge Alan T. Tufts

Heard: June 3rd 2009, in Kentville, Nova Scotia

Written decision: October 15, 2009

Charge: s.254(5) CC
s.253(1)(a)

Counsel: William Watts, for the Crown
Philip J. Star, Q.C., for the defence

By the Court (orally):

[1] The defendant was charged under s. 254 and 253(1)(a) of the **Criminal Code**. Particularly it was alleged he failed to comply with the demand to provide samples of his breath suitable for analysis and further it was alleged that he was driving while his ability to operate a motor vehicle was impaired by alcohol. The impaired driving charge was dismissed at the conclusion of the Crown's case. This leaves just the "fail to provide" charge to deal with today.

FACTS

[2] Let me review, the underlying facts in this matter. The events in question took place July 12, 2008. The defendant's vehicle was seen in the parking lot at the Top Hat Lounge in Greenwood early that morning around 1 a.m. by Constable MacDonald, who was part of a six-member team doing "impaired driving" checks in the area. When the checkpoint setup ended and Constable MacDonald was driving back home he noticed the defendant's vehicle at a gas station in Nictaux and remembered he saw the vehicle in the lounge parking lot earlier. It was a yellow Hummer, a very distinctive automobile according to Constable MacDonald.

[3] It was for this reason Constable MacDonald followed and eventually stopped and detained the defendant, who was driving this vehicle. No issue was raised about the manner or way this vehicle was stopped.

[4] Constable MacDonald noticed a strong smell of liquor or alcoholic beverage when speaking with the defendant. For this reason he asked the defendant to provide a breath sample for the approved screening device. The device registered a fail. The defendant has admitted the police had the proper grounds for both the approved screening device demand and the so-called "Breathalyzer demand" and that the defendant was taken for testing as soon as was practicable. No charter issues were raised regarding the rights to counsel or any other issue for that matter.

[5] Constable MacDonald described the defendant blowing into the approved screening device. He said he gave a "very good sample". He said he blew into the device two or three seconds after a solid tone from the device could be heard and after a suitable sample was received. The officer said he could hear excess air coming out

of the device. He said he, that is the defendant, had no difficulty providing a sample. Constable MacDonald also described the drive back to the Kingston Detachment. He said the silent patrolman screen was broken and therefore remained open. He said the defendant was quiet and that he heard no coughing or belching or other sounds. He never described any indication that the defendant was suffering from anxiety or shortness of breath.

[6] Constable MacDonald then described that when he reached the police detachment that the defendant spoke to a lawyer. He asked for a glass of water after he coughed for the first time when exiting the phone room. He was allowed a drink of water. Constable MacDonald said that he saw the defendant later when he was with Constable Goliath and was trying to blow into the Datamaster. Constable MacDonald compared this to his earlier efforts to provide samples for the approved screening device. He said that these efforts he witnessed was “nothing close to what he had saw earlier”, to use Constable MacDonald’s words. He said the defendant was blowing intermittently; that is short, intermittent blows. This was unlike what he had done at the roadside when Constable MacDonald said the defendant gave a deep breath and blew it all the way out. He said he earlier blew hard and constant and beyond what was required.

[7] The defendant was introduced to Constable Goliath, the breath technician. He described how this was the hundred and seventieth test he had performed on the Datamaster C, the approved testing device. He noticed the defendant had a strong smell of liquor coming from him and had bloodshot eyes. Constable Goliath started the procedure at 4:29 a.m. and concluded it at 5:12 a.m. This included an initial observation period followed by 8 attempts by the defendant to provide a breath sample. Constable Goliath described in detail how to provide a suitable sample to the defendant. He exchanged the mouthpiece several times. Before testing he suggested the defendant go outside for fresh air after the defendant began coughing. Constable Goliath said that the instrument was “fully operational” which in cross-examination he did describe as essentially being satisfied that the analysing solution was current. He never described any checklist procedure for testing. He did not testify that the instrument was “working properly”.

[8] Constable Goliath then described in detail each attempt that the defendant made. He said in the first two attempts the defendant did not introduce a sample into the device. He said he puffed up his face and inflated his lips until his face turned red.

He said the instrument went “beep, beep” which is what it does apparently until a suitable sample is introduced at which time a solid tone can be heard. He said in this case no solid tone could be heard. He also described that when a sample is introduced the nozzle fogs up with condensation. That did not occur in these instances. He said he could not hear any sound of air going in. He said this attempt lasted for five or six seconds. The defendant was told he did not blow hard enough. During the second time the defendant did the same thing.

[9] After this Constable Goliath got another mouthpiece and demonstrated for the defendant. A new mouthpiece was then inserted and the defendant was asked to make a third attempt. This time the defendant blew for about two seconds. The tone went from intermittent beep to a solid tone for a very short period and then went intermittent again. He said the defendant took a big breath but blew intermittently. Constable Goliath said that this was not a suitable sample.

[10] At this point Constable Goliath described that the defendant had stopped coughing. The defendant was asked whether he was physically able to provide a sample. He replied he “could yes”. On the fourth attempt the same thing occurred and when the defendant was told that he had not properly complied the defendant became very agitated. On the fifth attempt the defendant took a very big breath and blew very hard. He expelled “everything”, to use Constable Goliath’s words. The instrument then registered “invalid” which Constable Goliath explained happens when one blows irregularly. The defendant was told he blew too hard this time.

[11] Constable Goliath demonstrated to the defendant again how to blow into the instrument and a new mouthpiece was inserted into the tube for the defendant to blow for a sixth time. Again the defendant blew in short blows stopping and starting several times in an intermittent fashion. Constable Goliath then explained to the defendant the consequences of a failure to provide a suitable sample and the fact that the same penalties apply as failing the test. The defendant was asked to blow again. This time, the seventh time, the same thing happened. The defendant started and stopped blowing in an intermittent fashion.

[12] The defendant then offered to provide a blood sample which the police refused to accommodate. The defendant was asked whether he was physically able to provide a sample. He replied, “Maybe yes, maybe no”. The defendant asked to try one more time. Constable Goliath told him this would be the last attempt. Again the defendant

blew for only a short time and stopped and started as he had done before. He was then advised he would be charged and arrangements were made to house him overnight.

[13] Throughout this procedure the defendant again asked on three more occasions to try again but he was not permitted to do so. In Constable Goliath's opinion the defendant failed to provide a sample of his breath suitable for analysis. He said the last two occasions there was a good, tight seal as the defendant blew into the instrument -not so on the sixth attempt. Constable Goliath explained that his practise included keeping his hand on the tube to detect any leakage. It is implicit in Constable Goliath's testimony that the defendant, in his opinion, that is Constable Goliath's opinion, was simply not blowing properly, i.e. constantly and sufficiently hard to provide a sample suitable for the instrument to analyse. This occurred on all the attempts except for the fifth attempt when the defendant blew too hard, which means the sample being insufficient for analysis.

[14] The defendant was lodged overnight. At approximately 10:30 a.m. E.M. paramedics were called because the defendant complained about anxiety and shortness of breath. The paramedics did not testify although their report was referred to. It confirmed that an odour of alcohol was noted on the defendant but his breathing was regular. He was offered an opportunity to go to the hospital but he declined.

[15] The defendant testified. He said he consumed less than two bottles of beer throughout the entire day previously and during the early morning hours of the day in question. He was never cross-examined on this. He was never asked; for example, where he went after the bar closed and before he was seen at the gas pumps.

[16] The defendant said he first began to experience anxiety on the way to the police station while in the police car. He said he had asthma and used two puffers, although neither was prescribed for him. He said he was a smoker. He said that on each time he blew into the Datamaster and the approved screening device he did so with a similar effort. He said sometimes he was told he was blowing too hard and that other times he blew not hard enough.

[17] He said that he did his best effort. He opined that he thought there was something wrong with the instrument. Because of this he asked Constable Goliath if he could provide a sample. He added that Constable Goliath would not blow into the

instrument himself although the defendant asked him to do that. He testified that he asked Constable Goliath if he could provide a blood sample.

THE DEFENCE POSITION

[18] The defendant argues that the Crown has failed to prove beyond a reasonable doubt that the defendant intentionally failed to comply with the demand to provide breath samples or a breath sample. Alternatively the defendant argues that he has a reasonable excuse for not complying and that he has established that excuse on the balance of probabilities. The defendant submits that his testimony should be accepted or at the very least it raises a reasonable doubt that he intentionally failed to provide a suitable sample. He argues that he did his best; that it is not for the defence to explain why the instrument failed to provide a reading. He says the combination of his anxiety and his asthma raise a reasonable doubt about any intention by him to fail to provide a sample. He also argues that given his low level of consumption of alcohol he had no motive not to provide a sample. The defendant also says that his request to provide a blood sample also raises a doubt about his intention.

ANALYSIS

[19] The Crown must establish beyond a reasonable doubt that the defendant failed to comply with a demand to provide breath samples. Particularly the Crown must establish the defendant failed to provide samples of his breath which in the opinion of a qualified technician will enable a proper analysis to be made of the blood alcohol concentration.¹ It is therefore the opinion of the technician as to the suitability of sample which is important. The Crown as well must show that any failure by the defendant was intentional; that is, the *mens rea* of the offence.²

¹*R.v.Dolphin*, [2004] M.J.N. 433 (Q.B.)

²*R.v.Pringle*, [2001] B.C.J. No. 2596; see also *R.v.Sheehan*, [2003] N.J No. 57 (PC); *R.v.Dolphin*, *supra*; *R.v.Barkhouse* 2008 NSPC 2; *R.v.Barn*, [1985] N.S.J. no. 215 (CA); *R.v. William Allen Goodwin* unreported January 5, 2004 NSPC Case Nos 1323261 and 1323262

[20] Here there is no issue that a proper demand was made and that Constable Goliath is a qualified technician. Clearly in his opinion the defendant failed to provide a proper sample. I will come back to the issue of the possibility that the instrument was not operating properly later in my analysis. Subject to this issue it is clear in my opinion that the Crown has established the *actus reus* of the offence. The issue is whether the *mens rea* has been established by the Crown to the criminal standard of proof, or alternatively whether the defendant has established a reasonable excuse on the balance of probabilities.

[21] In cases where the defendant has refused to provide a sample the analysis is much easier. In those cases the emphasis will most likely be on the issue of reasonable excuse if the Crown has established a refusal beyond a reasonable doubt. In cases where the allegation is that the defendant failed to provide a suitable sample the analysis is more complex. Is it an intention issue or is it a reasonable excuse issue? This was the focus of the submissions by counsel when this case was argued.

[22] In my opinion both issues may arise in the same case. However the Crown must first establish beyond a reasonable doubt that the defendant intentionally failed to provide a suitable sample. It is only after the *mens rea* has been established does the burden shift to the defendant to establish a reasonable excuse on the balance of probabilities.³ This may, however, involve analysing the same evidence but recognizing that the onus is different in each instance. It should be kept in mind that credibility obviously plays a critical issue in both issues. In resolving the credibility issue when analysing the *mens rea* or the intention issue the Court must apply the so-called **W.D.** analysis. In other words, if the defendant's testimony is accepted or raises a reasonable doubt or after considering all of the evidence if the Court has a reasonable doubt that the defendant intentionally failed to comply with the demand the Court must acquit him.

[23] Let me begin by addressing the issue of the defendant's intention. It has been said that a person is presumed to intend the consequences of his acts that proof of the *actus reus* creates a presumption that the requisite *mens rea* is present. This was

³ *R.v.Peck*, [1994] N.S.J. No 39; *R.v.Barkhouse*, *supra*; for *contra* view see *R.v.Lewko*, [2002] S.J. no. 622 (CA)

referred to in the **Peck**⁴ decision by Justice Freeman in the dissent. The law has changed somewhat since then. Another way or perhaps a modern way of saying this is that there is a common sense inference that a person intends the consequences of his actions. This is dealt with in the **Robinson**⁵ case, with which I am sure counsel's familiar. In that case the Supreme Court of Canada said that it is a permissible inference but not a mandatory inference.

[24] In this instance there is a permissible or reasonable inference which may be drawn that because the defendant failed to provide a proper sample he intended to do so. However that inference can be rebutted, or not made, if you will, by simply raising a reasonable doubt about the defendant's intention. Of course, it is impossible to read a person's mind. One can only look to the evidence of the surrounding circumstances to determine the defendant's intention. This includes the defendant's own testimony. The Court must look at all of the evidence to determine if it can be inferred that the defendant intentionally failed to provide a proper sample.⁶ If there is any reasonable doubt about this the defendant must be acquitted.

[25] Let me then look at the evidence. I will begin by examining the defendant's own testimony. I summarized it earlier. The defendant said he blew the same each time including blowing into the approved screening device. However the description by both officers would contradict this. Constable MacDonald described the defendant blowing beyond what was required for the approved screening device. He said it was a very good sample - two or three seconds beyond what was necessary. Constable MacDonald witnessed at least one of the attempts by the defendant to blow into the Datamaster. This was not the same effort, according to Constable MacDonald, clearly, the defendant was using to blow into the approved screening device. Further, what Constable Goliath described was not consistent with the defendant using the same effort in each instance. Particularly on one occasion the defendant blew so hard that the sample was not able to be analysed. Other occasions he blew intermittently and on other occasions he hardly blew at all.

⁴ *R.v.Peck, supra*

⁵ *R.v.Robinson*, [1996] 1 S.C.R. 683 at para. 97 et seq; see also *R.v. Assaf*, [1987] N.S.J. No. 482 (CA)

⁶ See *R.v.Brown*, [2004] O.J. No 4423 (ONSCJ) where intent was found through "inference"; see also *R.v.Rosario*, [2007] B.C.J. No. 2815

[26] The defendant's testimony that he blew the same each time is simply not credible in my opinion. Furthermore the defendant's testimony that he blew as hard as he could is equally incredible for the same reason. It is clear that on at least two occasions blowing into the approved screening device and the instance when he blew too hard he was able to blow much harder than the effort he demonstrated to Constable Goliath on seven occasions. Constable Goliath demonstrated to the defendant on more than one occasion how to properly provide a sample by blowing into the instrument. In my opinion, in this case, it was not necessary for Constable Goliath to actually provide a breath sample into the instrument. The defendant had numerous opportunities to provide a sample. It was clear what he had to do. In my opinion he was capable of doing that given what each officer witnessed as I described above. His testimony to the contrary, in my opinion, is simply not credible.

[27] The only reasonable inference that one can draw from all of these circumstances is that the defendant intended to fail to provide a suitable sample. Is there any reasonable doubt about this conclusion? The defendant says that he had no motive given the little amount of alcohol he consumed. The defendant was not cross-examined on this issue, however as I explained above, I did not find the defendant credible.

[28] I agree that motive is not an element of this offence nor is absence of evidence about motive relevant. However, evidence showing no motive can be relevant and can be a factor in considering whether the defendant intentionally failed to comply with a demand.⁷ However in my opinion this does not raise a reasonable doubt in this case. The defendant had already provided a sample into the approved screening device which had produced a fail result. He knew he had failed the approved screening device. Whether that result is accurate or not is not the issue. However it does make the defendant's implicit argument that, "I did not have much to drink therefore I had no motive not to blow because presumably I will not fail" very weak, in my opinion.

[29] Furthermore the officer's evidence about the strong odour of alcohol and bloodshot eyes also undercuts this argument. I do not believe the defendant when he testified he only had two drinks. In short, the defendant's assertion that he had little

⁷*Lewis v. The Queen*, [1979] 2 S.C.R. 821; see *R.v.Haller*, [2006] O.J. No.4619

to drink does not raise a reasonable doubt about his intention to fail to provide a breath sample.

[30] Does the defendant's request to provide a blood sample raise a reasonable doubt? In my opinion it does not nor does his further request to try again after Constable Goliath informed him he would be charged with fail to provide. In my opinion these actions by the defendant are simply part of an overall effort to thwart the whole process of providing a sample. While in some cases this type of evidence may be relevant to determining the defendant's intentions to provide a sample,⁸ in this case in my opinion they raise no reasonable doubt. When viewed in the context of the entire circumstances in my opinion they are simply part and parcel of an effort by the defendant to manipulate the whole process.

[31] Finally let me address the issue of whether the instrument was working properly. In my opinion it is not essential that the Crown prove that the instrument was working properly; however in some instances the Crown's failure to do so may raise a reasonable doubt as to whether the defendant in fact provided a proper sample, ie., a reasonable doubt about the *actus reus* of the offence.⁹ However it is the quality of the sample that is the focus. It must be one which in the opinion of the qualified technician is sufficient to enable a proper analysis to be made.

[32] In my opinion in this case it was more than just that the Datamaster would not provide a reading. Constable Goliath explained in considerable detail why the defendant's efforts were not producing a proper sample. It was not just that the instrument failed to analyse which was the basis of the officer's opinion, in my view. I detailed that above. This was an experienced officer who testified that it was his hundred and seventieth testing. His opinion was never challenged in cross-examination. Even in the case where the defendant blew too hard Constable Goliath carefully explained why the instrument would not provide a valid reading.

[33] There was no direct testimony that the instrument was working properly. Constable Goliath said the instrument was fully operational, which he explained in

⁸ *R.v.Haller, supra*

⁹ *R.v.Levesque*, [1985] B.C.J. No. 1949 (CA); see also *R.v. Roberts*, [1997] B.C.J. No.2488; *R.v.Gutierrez*, [2009] O.J. No. 3659

cross-examination as I indicated earlier, simply meant that the solution lot numbers and dates were checked and the instrument was ready for operation. While it would have been preferable for the evidence to be clear on this in my opinion it does not raise a reasonable doubt as to whether the defendant in fact failed to provide a sample. Given the evidence in this case it would simply be inappropriate speculation to suggest that the failure was a result of the instrument not working properly.¹⁰

[34] This is not a case where there is any air of reality to the assertion that the failure was the result of some possible malfunction with the instrument such that the Crown would be obliged to establish that the instrument was working properly. In any event taking Constable Goliath's evidence as a whole the only reasonable inference that one could draw in any event would be that the instrument was in fact working properly.

[35] Accordingly, as I explained above, I do not accept or believe the defendant's testimony. For the same reasons I have described above his testimony does not raise a reasonable doubt. It is rejected. This is not just a case of preferring the officer's testimony over the defendant. It is not a credibility contest. I have carefully considered the defendant's testimony in the context of the entire evidence and further considered all of the evidence as a whole. I do not have a reasonable doubt that the defendant in fact failed to provide a proper sample and further that he intentionally failed to provide such a sample.

[36] The only remaining issue is whether the defendant has established on the balance of probabilities that he had a reasonable excuse for his failure. The only possible excuse would be the combination of his anxiety and his asthma. As I explained above I do not accept the defendant's testimony as credible. On the two occasions that I described above he blew much harder than he had on many other occasions. His medical condition did not prevent him, in my opinion, from exhaling large amounts of air. Particularly he provided a good sample into the approved screening device.

[37] There is simply no other supporting evidence that would suggest that the defendant's alleged anxiety or his asthma was a reasonable excuse. In my opinion the defendant's coughing, his need to get fresh air or the attendance of the paramedics does not provide any support for this assertion. He has not met the required burden.

¹⁰ *R.v.Mowery*, [2008] S.J. No.65(PC)

In my opinion the defendant was capable of providing a sample and simply wanted to frustrate the whole process and intended to fail to provide such a sample. He had no reasonable excuse. His testimony to the contrary is rejected.

[38] I am satisfied beyond a reasonable doubt that the Crown has proven the required elements of the offence. Accordingly he is found guilty under s. 254 of the **Criminal Code**.

A. Tufts, J.P.C.