PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Upshaw, 2010 NSPC 39

Date: 20100420
Docket: 1960139, 1960140
Registry: Kentville

Between:

Her Majesty the Queen

v.

Kevin Andrew Upshaw

Judge:	The Honourable Judge Alan T. Tufts
Heard:	December 16, 2009, at Kentville, Nova Scotia
Written decision:	May 26 , 2010
Charge:	253(1)(b) CC 253(1)(a) CC
Counsel:	M. Ingrid Brodie, for the Crown Curtis Palmer, for the defence

By the Court: (orally)

[1] The defendant is charged under s. 253(1)(b) and 253(1)(a) of the *Criminal Code*. He is applying to have certain evidence excluded in the trial of this proceeding and the defendant argues that his s. 8, 9 and 10(b) *Charter* rights have been infringed. Particularly the defendant says that he was improperly questioned by the police after he was stopped and the police decision to detain the defendant was outside the scope of the authority set out in the Supreme Court of Canada decision of *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

[2] His detention began, he argues, when the police made a U-turn to follow the defendant and had not done so for driving offence enforcement. The defendant also argues that the Supreme Court of Canada's decision in *R.v. Orbanski* and *Elias*, 2005 SCC 37 does not apply in the Province of Nova Scotia.

THE FACTS

[3] The events in question took place on the 12th of September, 2008 at approximately 4 a.m. on Belcher Street inside the town limits of the Town of Kentville. Constable Burke was at the dispatcher's office for the police department located at 258 Belcher Street. As he was leaving he noticed an automobile going by his location proceeding up Belcher Street and moving from his left to his right. He left and drove in the same direction as the car he had just seen. As he was heading out of town he saw the same car coming in the opposite direction heading back into town. Constable Burke made a U-turn in his police vehicle and continued to follow this car.

[4] As the car went down the hill on Belcher Street he signalled the car to stop. The car pulled over. He approached the driver. It was the defendant who had been driving this car. He was the sole occupant. Constable Burke explained initially that he followed the car, made the U-turn to continue his action and eventually stopped the car in furtherance of his efforts to look for impaired driving, although it seems he did not decide to stop the car until after he made the U-turn. He continued to just follow the car for that purpose and stopped the car, he explained, to check for license, registration and insurance and for sobriety.

[5] He explained that this was a Thursday “bar night” and that the bar closes around 2 a.m. He says he was checking vehicles for sobriety for that reason. He was never asked, however, how many other drivers, if any, he had stopped earlier in the two hours since the bar had closed, or when he had decided to make these kinds of stops. In any event he explained that he knew the driver from before but did not know who the driver was until he was stopped.

[6] Constable Burke approached the defendant, asked for his “license, registration and insurance”. The defendant produced his license but continued to look for his other documents. During this time the officer said the defendant’s speech was slightly slurred and that he said he could smell alcohol coming from the car. He asked the defendant where he had come from and asked how much he had to drink. The defendant replied he had come from his girlfriend’s and that he had “a few drinks”.

[7] Constable Burke concluded the defendant had consumed alcohol, although he conceded he did not tell the defendant that. He conceded in cross-examination that he did not make any reference in his notes about slurred speech or the smell of alcohol on the defendant’s breath while he spoke to him in the defendant’s car, nor did he put in his notes that the stop was partially related to checking for sobriety. He acknowledged he never smelled alcohol from the defendant’s breath until he was back in the police car. As a result of his encounter at the defendant’s car Constable Burke asked the defendant back to the police car. He placed him in the back seat of the police car with the door open. He gave the approved screening device demand, administered the test and eventually gave the defendant the breath demand and the defendant later provided breath samples which were analyzed.

THE DEFENCE POSITION

[8] The defence argues that his s. 8, 9 and 10(b) *Charter* rights were violated. Particularly he argues that stopping the defendant’s car was arbitrary. He argues that the “stop” began when Constable Burke made the U-turn and intended to follow the defendant’s car, which at that point he had not decided to effect a traffic stop for motor vehicle enforcement or sobriety purposes. Therefore, the defendant argues the stop, which started with the U-turn, was effected not for any purpose related to motor vehicle enforcement or sobriety testing. It was therefore arbitrary

and cannot be justified. It is, the defendant argues, an unjustifiable s. 9 *Charter* violation.

[9] Further the defendant argues that questioning by Constable Burke of the defendant's consumption of alcohol was improper without first providing the defendant's s. 10(b) rights and was outside the limits imposed by *R. v. MacLennan* (1995), 138 N.S.R. (2d) 369. It was conscripted evidence, the defendant argues, and cannot be relied upon by the officer in forming a reasonable suspicion that the defendant had alcohol in his body–the threshold to trigger a demand for the approved screening device testing.

[10] The defendant argues that to the extent *Orbanski*, *supra*, allows for questioning of motorists, that the judgment of the Supreme Court of Canada is specific to Manitoba and does not apply in any event in Nova Scotia. The defendant argues that there is no general stop provision which is the basis of the *Orbanski* judgment.

[11] The defendant therefore argues that without the police questioning, the officer had no basis for giving the approved screening device demand and accordingly the testing was unlawful and constituted an unreasonable warrantless search and seizure and should be excluded from forming any part of the basis for a breath sample demand. That being the case the breath testing analysis was an unreasonable search and seizure and constituted a s. 8 violation. The results of the analysis should be excluded from evidence, the defendant argues.

CROWN'S POSITION

[12] The Crown argues that *Orbanski* applies in Nova Scotia and has effectively overruled *Baroni, infra* and *Bishop, infra* and extended the *MacLennan*, *supra*, decision such that sobriety testing including appropriate questioning of drivers about their sobriety is within the justifiable scope of their authority and accordingly can be used to collect admissible evidence, admissible for the limited purpose of supporting a demand for breath testing.

THE LAW

[13] Before summarizing what I believe the law to be in this case it may be useful to provide a brief summary of the leading Supreme Court of Canada cases and cases from our appeal court on this subject. I am doing this essentially because it was argued very extensively during the submissions on this matter and there were considerable references by counsel to the various cases I intend to review. I have taken the opportunity of reviewing those and feel confident that I understand what the present state of the law is in Nova Scotia. It is important to review those cases to fully understand my conclusions.

[14] In 1985 the Supreme Court of Canada decided *R. v. Dedman*, [1985] 2 S.C.R. 2. The majority judgment was written by Justice Le Dain. The *Charter* was not argued and the case considered the authority of the police to conduct the RIDE program, a program in Ontario involving stops of motorists to reduce impaired driving. Justice Le Dain found that the police had a common law authority to protect the public and in doing so to control traffic. He held that the RIDE program fell within the common law authority of the police. A reliance on specific statutory authority was not necessary. He recognized that the scope of this common law authority required a balancing with liberty interests. At para. 70 he said,

> ...The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

[15] Justice Le Dain also recognized that operating a motor vehicle on a public highway is not a fundamental right, but a licensed activity subject to regulation and designed for the protection of life and property. The RIDE program's object was to protect safety. It was well-publicized and any interference met the test he defined and to which I just referred.

[16] In *R. v. Hufsky*, [1988] 1 S.C.R. 62 the Supreme Court of Canada dealt with this issue in the *Charter* context. In that case the police conducted a spot check for no particular reason, although it was part of an organized program for impaired driving prevention. Again Justice Le Dain wrote for the court, this time for a unanimous court, although not on this particular issue. The majority found that the random stop or spot check in that case was an arbitrary detention and violated s. 9 of the *Charter*. However the actions by the police were in accordance with s.

189(a)(1) of the Ontario *Highway Traffic Act*, which gave police the authority to require motorists to stop their vehicles–a so called "general stop" provision. The court found that while this provision prescribed a limit on a motorist's s. 9 rights it was justified under s. 1 of the *Charter*. In that case, after the officer stopped and asked to see the driver's license he detected an odour of alcohol and gave the driver an approved screen device demand. *Hufsky* was decided the same day as *R. v. Thomsen*, [1988] 1 S.C.R. 640, which found that screening device demand provisions were also a justifiable limit on a motorist's rights under s. 10(b).

[17] Seven days after *Hufsky* was decided the Ontario Court of Appeal decided *R. v. Saunders*, [1988] O.J. No. 397 (Ont. C.A.). There the Court of Appeal judgment written by Justice Cory, J.A., later to be a member of the Supreme Court of Canada, found that s. 189(a) and s. 30 of the Ontario *Highway Traffic Act*– this latter section specifically allowed police to stop motorists to determine if there was any evidence to justify breath demands–were justifiable limits placed on motorist's s. 10(b) rights to counsel and specifically justified the requirement of sobriety tests.

[18] The following year, in 1989, the Nova Scotia Court of Appeal decided *R. v. Baroni*, [1989] N.S.J. No. 242. This was an appeal from a County Court decision decided by Justice Freeman, as he was then, later to be part of the Nova Scotia Court of Appeal. In *Baroni* the accused was asked to perform classic sobriety tests– walk the line, finger on the nose type of tests. The Nova Scotia Court of Appeal agreed with Judge Freeman when he concluded that the accused in that case was detained but that the justifiable scope of the detention did not allow for the physical sobriety tests which were undertaken in that case. He added that Nova Scotia had no similar provision to those applicable provisions in the Ontario *Highway Traffic Act*. The closest section was s. 74(1), now s. 83 of the *Act*. He found as well that the *Criminal Code* provisions did not provide the authority, nor does the common law authority as discussed in *Dedman*, justify any limitation on the s. 10(b) rights with respect to the requirement to perform sobriety tests.

[19] On May 31, 1990 the Supreme Court of Canada decided *Ladouceur*, *supra*, and *R. v. Wilson*, [1990] 1 S.C.R. 1291. In *Ladouceur* the motor vehicle stop was completely random. The accused was asked to produce his license and was ultimately charged with suspended driving. Justice Cory, now on the Supreme Court of Canada, wrote for the majority in a 5-4 split decision. Again the Supreme

Court of Canada found that the authority under s. 189(a)(1) of the Ontario *Highway Traffic Act* was a justifiable prescribed limit on a motorist's s. 9 *Charter* rights. Justice Cory specifically referred to the common law authority to stop motorists as described in *Dedman*. This common law authority is also a prescribed limit justified by s. 1 of the *Charter*. However the stopping must be related to driving regulation. He said:

> ...Officers can stop persons only for legal reasons -- in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences.

[20] The stops clearly must be relatively short in duration and related to driving offences. Justice Cory does suggest drivers can be asked questions related to driving offences, which would include drinking and driving offences. In *Wilson, supra*, the Supreme Court of Canada came to the same conclusion, this time relative to the Alberta *Highway Traffic Act*, R.S.A. 1980, c. H-7, s. 119. The court uses the same basis as it did in *Ladouceur*, that the common law authority to allow for random stops is also a justifiable limit. It is also interesting to note that in that case the police stopped the accused driver in the vicinity of a bar with out-of-province plates. All of the justices agreed that this was not a random stop.

[21] In July of 1990 Justice Freeman decided a case called *R. v. Myra*, [1990] N.S.J. No. 492 when he was a justice on the County Court. I mention this because Judge Freeman wrote the majority decision in *MacLennan*, which I will discuss shortly. In *Myra* the accused was stopped purportedly under the authority of the *Wildlife Act*. Again s. 9 of the *Charter* was at issue. Judge Freeman again notes that Nova Scotia has not a legislative equivalent to s. 89(a)(1) of the Ontario *Highway Traffic Act*. However he did allow that a stop for the purpose of the *Motor Vehicle Act* or the *Wildlife Act* may be found in the common law. However in that case the evidence did not support any explanation for precisely why the police stopped the accused. Judge Freeman found that the police were on a fishing expedition.

[22] In February of 1995 the Nova Scotia Court of Appeal decided *R. v. MacLennan, supra*. Justice Freeman again writes for all three judges. In that case after the accused was stopped police smelled alcohol coming from his vehicle. He was asked back to the police car during which time the police noted signs of impairment. The issue again was whether a random or arbitrary motor vehicle stop

was justified. Judge Freeman reviewed *Dedman*, *Hufsky*, *Ladouceur* and *Wilson*. He concluded that s. 83, which I referred to earlier, of the Nova Scotia *Motor Vehicle Act*, formerly s. 74(1) which he had referred to earlier, is essentially similar to s. 89(1)(a) of the Ontario *Highway Traffic Act*–see para. 37, and is similar to s. 119 of the Alberta *Highway Traffic Act*, the one that was considered in *Wilson*.

[23] This seems to be a reversal of what he had said earlier in *Myra* and what was alluded to in *Baroni*. The Supreme Court of Canada cases, Justice Freeman for the Nova Scotia Court of Appeal found, are binding authority with respect to the relevant provisions of the Nova Scotia *Motor Vehicle Act*. Accordingly the Nova Scotia Court of Appeal found police are justified in randomly stopping motor vehicles in Nova Scotia for the purpose of controlling traffic, inspecting license, registration, insurance, for mechanical inspection and to detect impaired driving, absence any articulable cause. Any limitation on s. 9 *Charter* rights is justified.

[24] At para. 8 the court notes that the accused is entitled to remain silent and questioning by the police which might conscript the accused against himself is improper. This proposition followed the court's description of the questions asked by the police in that case. The accused in that case was asked where he had been and where he was going. The defendant in this case at bar argues that this suggests any questioning during the s. 10(b) suspension period is improper. However at para. 65 of *MacLennan* the court says the following:

> The suspension of the right to counsel and the guarantee against arbitrary detention under s. 9 of the *Charter* do not justify the taking of statements or searches unrelated to the control of traffic ie., the inspection of documents or mechanical condition and detection of drinking drivers.
> [emphasis added]

[25] Finally, in 2005 the Supreme Court of Canada decided two cases, *Orbanski* and *Elias*, *supra* both together, and both from the Province of Manitoba. In *Orbanski* the accused was asked to perform sobriety tests. In *Elias* the accused was asked if he had been drinking. In both cases no s. 10(b) rights had been given.

[26] In the case at bar the defendant argues that *Orbanski* and *Elias* can be distinguished because the Manitoba legislation is different from that in Nova Scotia. A careful review of *Orbanski* is necessary. Justice Charron writes for 5 of the 7 justices. She does a complete review of the law which I briefly referred to

above. She finds that the applicable provisions in the Manitoba *Highway Traffic Act* are "virtually identical" to the provisions of the Ontario *Highway Traffic Act* considered in *Ladouceur*. She also references the common law authority described in *Dedman*. She explains that police are authorized to exercise powers under s. 254 of the *Criminal Code*. She then concludes that the police are justified in stopping motorists to check for sobriety, that is part of the long-standing statutory scheme, in her opinion. The authority is implicit in the legislation, notwithstanding there is no specific authority. She then goes on to define the scope of this authority and finds that it includes the requirement to perform physical sobriety tests and to ask motorists questions related to sobriety as occurred in *Elias*. The court carefully circumscribes the scope of the detention, noting that it must be flexible but minimally inconvenient to the detainee. Given the issues in this case it is not necessary for me to expand on this as it is not argued that those constraints are necessarily in issue in this case.

[27] The court does find that any s. 7 rights in the *Elias* case need not have any further consideration from that given to the s. 10(b) issue. In short, in *Orbanski* and *Elias* the Supreme Court of Canada finds that the legislation and the common law authority are justifiable limits on motorists' s. 9 and 10(b) rights when those motorists are asked to perform sobriety tests or asked questions about their sobriety.

[28] So the question becomes does *Orbanski* and *Elias* apply in Nova Scotia? In my view this is clear. In *MacLennan* our Court of Appeal found that s. 83(1) is essentially similar to s. 89(a)(1) of the Ontario *Highway Traffic Act*, the one considered in *Ladouceur* and s. 119 of the Alberta *Highway Traffic Act*, the one considered in *Wilson*. *Orbanski* and *Elias* concluded that s. 76.1 of the Manitoba *Highway Traffic Act* is equivalent to the provisions in Ladouceur. Section 89 and s. 113 of Ontario and Alberta are both general stop provisions.

[29] Accordingly, in my opinion, s. 83(1) is a general stop provision and I believe that *MacLennan* makes this clear. The Manitoba legislation is not distinguishable from that in Nova Scotia for this reason, notwithstanding that the wording is not the same. Further, *Orbanski* and *Elias* make it clear that there is a common law authority to check sobriety of drivers in any event. This clearly applies in Nova Scotia. The scope of the statutory authority and the common law authority includes the authority to require sobriety tests and to ask questions of drivers and any

limitation on an individual's s. 9 or s. 10(b) rights is, in my opinion, justified for the same reasons that were expressed in *Ladouceur*, *Wilson* and *Orbanski* and *Elias*.

[30] *Orbanski* and *Elias* in my opinion applies in Nova Scotia and, effectively, it would seem, overturns *Baroni* and to the extent *MacLennan* suggested that police could not ask questions related to drinking and driving which is not, I would suggest, what the case necessarily says, that holding, it would seem, is also overruled. This is not to say that a driver is required necessarily, or compelled, to answer the questions but there is nothing to prevent the police from asking those questions notwithstanding that the *Charter* rights are not given.

[31] Of course, the scope of any tests or questions asked must comply with the principles set out by Justice Charron in her judgment in *Orbanski* and *Elias*– see particularly paras. 45-48. Given that this case does not, as I mentioned earlier, turn on the scope of the test I do not need to expand on that further. Suffice to say that clearly these are limits to the police power in this regard.

[32] So that brings us to this case. What of course is at stake here, as in all of these types of cases, is safeguarding individual freedom to move about in public without interference from the police. The fear or risk is that police may stop individuals for no reason whatsoever or, more concerning, for improper reasons. Our constitutional rights enshrined in our *Charter* are guarantees against this happening. However this risk or fear must be balanced against the pressing and substantial objective of the public's collective interest in having safe highways upon which other motorists and pedestrians can travel. This is the justification for upholding random motor vehicle stops made pursuant to provincial highway traffic legislation or pursuant to the common law.

[33] Random tests include the ability of the police to conduct sobriety tests and to ask motorists questions related to drinking offence enforcement. This was the focus of the jurisprudence that I reviewed above and in particular the decisions in *Ladouceur* and *Orbanski* and *Elias*. However the random stops and the accompanying questions must be related to enforcement of the Motor Vehicle Act, mechanical fitness and the sobriety of drivers. The scope of sobriety tests are also constrained by the need to be reasonably flexible but limiting in the sense that they

must be minimally constraining of the motorist, which again is explained in *Orbanski* and *Elias*.

[34] The focus then in this case is whether Constable Burke's actions fell within the justifiable scope? The circumstances are at first blush concerning. Why would Constable Burke simply begin following the defendant's car when he saw it drive by? However the evidence is that Constable Burke stopped the defendant's car because it was "bar night", notwithstanding that it was approximately 4 a.m. and the bars had closed at 2 a.m. His evidence on this point is simply uncontradicted. There is nothing in evidence to contradict his testimony of having set out to check out the defendant's vehicle for this reason.

[35] The defendant argues that as soon as Constable Burke made the U-turn the detention began and at that point the officer had not decided to affect a stop. I reject this argument. In my opinion there was no detention at this point. The officer made no direction to the defendant in any way whatsoever. He was clearly interested in the defendant's vehicle. Police are entitled to follow vehicles, surely, and particularly in circumstances such as this. There was no restriction on the defendant's liberty at this point. This is the case no matter what, if anything, the police had in mind, or did not have in his mind, for that matter. However, when the officer decided to pull over the defendant's vehicle it was arbitrary however in my opinion it fell within the scope of *Ladouceur*. It was justified. This is because it was related, in my opinion, to the highway traffic enforcement. Constable Burke testified he decided to stop the defendant to check "license, insurance and registration and for sobriety" or words to that effect.

[36] As the Crown Attorney very ably, in my opinion, pointed out, this is exactly what he did when he approached the defendant. He asked about the very same items that justified his stopping. There is simply no other conclusion or inference that can be drawn from the evidence than the officer stopped the defendant for the purposes of checking is license, registration, insurance and checking his sobriety–squarely within the scope of Ladouceur. In my opinion the questions related to that purpose were permitted to be asked by the officer to the defendant, including asking him how much, if any, he had to drink. This was related to the enforcement of both the Motor Vehicle Act and the Criminal Code and related to driving offences. It is clearly within Orbanski and Elias and in my opinion would

be allowable under MacLennan because it is questioning related to driving offences.

[37] The questioning by the police and the answers received from the defendant are legally justified notwithstanding any s. 10(b) or s. 7 violation for that matter. The provisions of the *Motor Vehicle Act* of Nova Scotia and the common law authority allow this and justify any *Charter* violation. The cases referred to by the defendant can be easily distinguished and it is not necessary for me to chronicle each one of those. I would just point out that in *R. v. Peel*, 2003 NSPC 66, which is a decision I decided myself there was simply no evidence that the officer in that case stopped the defendant for any driving-related offence or for any other permissible reason. There was no evidence of what the reasons were in that particular case.

[38] Also it is not necessary for me to deal with the case of *R. v. Tsavos*[1] 2006 NSSC 227. That is the case that I had referred to counsel and which they kindly commented on. It is not necessary for me to review that.

[39] In my opinion *R. v. Bishop* 2003 NSSC 213 and *Baroni* are effectively overruled, it would appear, by *Orbanski* and *Elias*, in that the scope of questioning and sobriety tests in Nova Scotia are governed by the judgment of Justice Charron in *Orbanski* and *Elias*.

[40] Here the question of the defendant's drinking was proper. The answer received together with the smell constituted reasonable suspicion that the defendant had alcohol in his body. He was entitled, that is the officer, to have the defendant come back to the car to be screened with the approved screening device. The fail result gave the officer reasonable and probable grounds for the breath demand. There were no other *Charter* violations which were not justified, as I explained above, and consequently it is not necessary for me to deal with any s. 24(2) *Charter* application. The defendant's application is dismissed.

A. Tufts, J.P.C.

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[1] Here the NSSC concludes at para. 23 that s. 83 of the Nova Scotia Motor Vehicle Act is a general stop provision as well as empowering police to check for drivers' sobriety, although that point was not argued.