**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** R. v. Swinkels, 2005 NSPC 55

**Date:** 20051014
**Docket:** 1539683
**Registry:** Antigonish

**Between:**

R.

v.

Catherine Ann Swinkels

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| **Judge:** | The Honourable Judge Marc C. Chisholm |
| **Heard:** | October 14, 2005, in Antigonish, Nova Scotia |
| **Charge:** | s. 254(5) CC |
| **Counsel:** | Ronald MacDonald, Q.C., for the Crown<br>Maurice Smith, Q.C., for the defence |

**By the Court**:

## Introduction

[1] The defendant is charged with the offence that she:

> On or about the 8th day of May 2005, at or near Fairview Street, Antigonish, Antigonish County, Nova Scotia, did, without reasonable excuse, refuse to comply with a demand made to her by a peace officer under section 254(2) of the Criminal Code to provide forthwith a sample of her breath necessary to enable a proper analysis of her breath to be made by means of an approved screening device, contrary to section 254(5) of the Criminal Code.

## Position of the Parties

[2] The defense position is that the demand made by the officer to Ms. Swinkels was not lawful because: (1) of the passage of time from the end of the driving by the accused and the time the demand was given to her; and (2) the demand was not made in circumstances where there was no reasonable opportunity for the accused to consult with counsel.

[3] The position of the Crown is that the demand was lawful in that it was contemporaneous with the driving and the accessibility of a telephone does not affect the lawfulness of the demand in the circumstances of this case.

## Evidence

[4] The evidence consisted of two crown witnesses, Constable Geoffrion and Constable Bernard. Their evidence was consistent on most points. Where their evidence differed, and, in my view, the difference was relevant, I will speak to the differences as they arise in the sequence of events. I found the evidence of both officers straightforward and credible. I accept their evidence and find the facts as follows.

[5] On May 8, 2005, at approximately 7:13 p.m., Constable Geoffrion received a call by police radio advising her that a woman who identified herself as Ms. Swinkels called the police station and wanted to make a complaint of

spousal assault upon herself. From her police vehicle, using her cell phone, Constable Geoffrion telephoned Ms. Swinkels. The two had a brief conversation in which they agreed to meet at the police detachment where Ms. Swinkels would provide a statement regarding her complaint. Constable Geoffrion proceeded to the parking lot of the police station. She arrived before Ms. Swinkels. According to Constable Geoffrion, Ms. Swinkels arrived " a few minutes" after 7:23 p.m., or at approximately 7:30 p.m.

[6] The vehicle driven by Ms. Swinkels upon entering the police parking lot drove into a clearly marked handicapped parking spot, backed out of that spot and into a second handicapped parking spot, then backed out of that spot and into a third regular parking spot but at a 45 degree angle to the parking spot. Ms. Swinkels then exited the vehicle. She was alone. Constable Geoffrion and Constable Bernard exited the police vehicle and met Ms. Swinkels in the parking lot. Ms. Swinkels had a slight odour of alcohol on her breath. Ms. Swinkles was upset. Constable Geoffrion, having observed the erratic driving and noting the smell of alcohol and red/bloodshot eyes, formed the belief that Ms. Swinkels' ability to operate a motor vehicle may have been impaired by alcohol and she felt she had grounds to give a s.254(2) demand.

[7] After a brief conversation, the three proceeded to the detachment doors, which were locked. Constable Bernard opened the doors and the three proceeded inside the police station to an interview room. In the interview room Constable Geoffrion noted the smell of alcohol on Ms. Swinkels' breath was stronger. Constable Geoffrion left Constable Bernard and Ms. Swinkels and went to another room in the police station where she obtained a screening device which she stated was a Dragger. Having obtained the device, she returned to the interview room where, at 7:42 p.m., she made a demand of Ms. Swinkels pursuant to s.254(2) of the Criminal Code. She may have read the demand twice. Ms. Swinkels immediately refused. Constable Geoffrion then arrested Ms. Swinkels for impaired driving and read her her s.10(b) Charter rights. Ms. Swinkels declined to call a lawyer. Shortly thereafter, Constable Geoffrion advised Ms. Swinkels that she was under arrest for refusal of the s.254(2) demand and not for impaired driving. Constable Geoffrion then left the interview room and Constable Bernard took a statement from Ms. Swinkels regarding the alleged assault.

[8] Constable Geoffrion estimated that it was 10 to 15 minutes at the most from the time Ms. Swinkels arrived at the police station parking lot until the demand was given. Constable Bernard stated that this period was "not a long time." She estimated it was ten minutes. Constable Bernard noted the demand was given at 7:40 p.m., unlike Constable Geoffrion who indicated it was at 7:42 p.m. There was no evidence to explain the difference between the two officers' evidence regarding the time of the demand. It may have been that they were referring to different timepieces. I do not find the difference to be of any significance.

**Was the Demand Sufficiently Contemporaneous to the Driving?**

[9] Section 254(2) permits a peace officer to make a demand to a person whom he reasonably suspects is driving a motor vehicle with alcohol in his/her body. The issue in the present case involves the interpretation of the phrase "who is driving."

[10] In **R. v. Misasi** (1993), 79 C.C.C. (3d) 339, the Ontario Court of Appeal upheld a conviction wherein the officer delayed giving the alert demand for a period of five minutes at roadside. In **R. v. Latour**, [1997] O.J. No.2445, the Ontario Court of Appeal upheld a conviction wherein the officer waited eight minutes at the scene for the alert to arrive and a further four minutes before the test was conducted. In **R. v. Campbell** (1988), 44 C.C.C. (3d) 502, the Ontario Court of Appeal upheld the acquittal of the defendant where an alert demand was given at the police station ten minutes after the end of the driving. The police station was a six minute drive from the scene. The Court of Appeal stated that the time lapse should be no longer than is reasonably necessary to enable the police officer to carry out his duties under the provision and the demand should be made as soon as reasonably possible under the circumstances.

[11] In **R. v. Orbanski**; **R. v. Elias**, [2005] S.C.J. No. 37, the Supreme Court of Canada recognized and accepted that some delay would result from an officer carrying out duties such as asking questions of a driver or having him/her perform brief sobriety tests to ascertain if there are grounds for a demand. These duties were referred to as "reasonable and necessary."

[12] In **R. v. Smith**, [1994] N.S.J. No. 485 (NSCA), the officer who observed grounds for a s.254(2) demand delayed giving the demand until the screening device was brought to the scene five minutes after the driving stopped. At p.6 of the decision, the Court of Appeal stated:

> There is no requirement that the police officer act forthwith after forming a reasonable suspicion the person has alcohol in his body. However, if a person is detained prior to the demand, the rationale in Thomsen does not apply. A person so detained is entitled to be informed of his rights under s.10(b) of the Charter without delay...

[13] The Court confirmed the defendant's conviction.

[14] In **R. v. Snow**, [1998] N.S.J. No.220, Crawford, PCJ, the defendant was stopped in the early morning in a rural location by an officer who was not qualified to administer a screening test. The officer called for another officer to come to the scene. Twenty-nine minutes passed before a second officer arrived at the scene and, after noting grounds for so doing, gave a screening demand. The Court held that the delay was no more than was necessary in the circumstances.

[15] In **R. v. DeBaie**, [2000] N.S.J. 221, Gibson, ACJ, the defendant was stopped at a police checkpoint. Having observed grounds for a s.254(2) demand, the police detained the defendant and called for a screening device to be brought to the scene. A delay of 20 minutes occurred before the demand was given. The court found the delay was too long in the circumstances, i.e., that it was not forthwith. The court added that, had it not so found, it would have held that the accused's s.10(b) Charter rights were violated and the defendant, therefore, had a reasonable excuse for refusing the demand.

[16] In my opinion, the term "forthwith" does not apply to the timing of the giving of the s.254(2) demand by a peace officer, however, the wording of the provision clearly requires contemporaneity of the demand because it must be given to a person who is operating or in care or control of a motor vehicle. I find the proper statutory interpretation of those words to be as stated in **R. v. Campbell**, *supra*:

> The demand should be made as soon as reasonably possible under the circumstances and the delay should be no longer than is reasonably necessary to enable the police officer to carry out his duties under the provision.

[17] As stated in **R.v. Latour** (1997), 34 O.R. (3d) 150 (Ont.CA), the trial judge must look at the entire circumstances, including the period of delay, in determining whether the demand was lawful.

[18] The circumstances of this case are quite unique in that the defendant was not in custody prior to the demand. She voluntarily entered the police station and went to an interview room to give a statement regarding an alleged spousal assault. She was unaware of Constable Geoffrion's decision to give her a s.254(2) demand until the demand was made. Based upon the decision in **R. v. Hawkins** (1993), 79 C.C.C. (3d) 576 (SCC), it is my view that the defendant was not detained prior to the demand being made to her.

[19] I find that the period of time from the defendant's arrival at the police station to her being given a s.254(2) demand was more than ten minutes and less than fifteen minutes. During that period, the defendant parked her vehicle in an erratic manner as observed by the police officers. After parking, the defendant exited her motor vehicle and had a brief conversation with the police officers. During that contact, Constable Geoffrion formed her reasonable suspicion that the defendant was operating a motor vehicle with alcohol in her body. In relation to that period of time, the police officer was performing reasonable and necessary duties under the provision to ascertain whether there were grounds for a demand.

[20] Constable Geoffrion, upon noting grounds for doing so, did not immediately give the defendant a demand. She decided she would permit the defendant to proceed into the police station to an interview room and give the demand there after obtaining the screening device. In the unusual factual circumstances of this case, in my view, the interview room in the police station was in the immediate vicinity of the driving–as much so as the back seat of the police vehicle in the station parking lot.

[21] Once the defendant was in the interview room, Constable Geoffrion went to retrieve the screening device before making the demand. This resulted in a

period of delay of a few minutes in the demand being made. The actions of proceeding to the nearby interview room and retrieving the screening device from another room in the station are, in my view, reasonable duties for the officer to perform pursuant to the provision.

[22] I find the present case distinguishable from the **R. v. Campbell** and **R. v. DeBaie** cases in terms of the length of the delay, the reasons for the delay and the fact that, in this case, the defendant was not detained during the period in question. On the facts of the present case, I find that the demand by Constable Geoffrion was made as soon as reasonably possible in the circumstances, given the duties the officer was performing.

**Lawful Demand - Reasonable Opportunity to Consult Counsel**

[23] Counsel for the defendant submitted that the demand was not lawful because it was given in circumstances where there was a reasonable opportunity for the defendant to consult counsel. Defense counsel relied upon the decision of the Ontario Court of Appeal in **R. v. Danychuk** (2004), 70 O.R. (3d) 215. In **Danychuk**, the defendant was noted to drive erratically. Upon stopping the defendant, the officer noted a smell of alcohol on the defendant's breath. The officer gave a s.254(2) demand. The defendant immediately refused. The officer did not have a screening device at the scene. The trial judge accepted a defense argument that, to be a lawful demand, the officer giving the demand must have the screening device on hand and ready and must explain its operation to the defendant. The Ontario Court of Appeal overturned the acquittal holding that none of those items were prerequisites of a lawful demand. The Court reiterated comments of the Court of Appeal in earlier decisions, **R. v. Cote** (1992), 6 O.R. (3d) 667 and **R. v. Latour** (1997), 34 O.R. (3d) 150, stating that, to be lawful, the demand must be made in circumstances where there is no reasonable opportunity for the defendant to consult counsel. In **Cote** there was a period of 15 minutes between the demand and opportunity for a test, five of those minutes at the police station. The court held that the demand was not lawful and, therefore, need not deal with the Charter issue. In **Latour** there was a delay of twelve minutes at roadside for the device to arrive and be prepared. No Charter

rights were given. The Court of Appeal restored the conviction entered at trial.

[24] There are two other Ontario Court of Appeal decisions on this point that I have considered.

[25] In **R. v. Sadlon**, [1992] O.J. No.912, the defendant was given a demand by an officer who was in possession of an approved screening device. A telephone was immediately available to the defendant. At p.2 the Ontario Court of Appeal stated:

> A demand by a police officer, which complies with the statutory requirements, to provide forthwith a sample of breath by means of an approved screening device located in the immediate vicinity is a valid demand under s.254(2). The exclusion of the right to retain and instruct counsel and to be informed of that right on the detention attendant upon such a demand has been held to be a reasonable limit demonstrably justified in a free and democratic society. The existence, or non-existence, of the constitutional right of a person detained in respect of such a demand validly made, cannot appropriately vary on the basis of how far the person detained happens to be from a telephone at the time the demand is made.

[26] In **R. v. George**, [2004] O.J. No.3287, the defendant was given a s.254(2) demand and waited at roadside for 16 minutes for the screening device to be brought to the scene and presented to him. Two minutes later he provided a sample and registered a fail. He was then given a breathalizer demand and blew over. At trial the defense made a Charter motion for the exclusion of the breathalizer results based upon the submission that the defendant should have been advised of his rights under s.10(b) of the Charter and given a reasonable opportunity to exercise them. The trial judge accepted the defense submission and excluded the evidence. The Court of Appeal at p. 10, stated:

> Where an officer is in a position to require that a breath sample be provided by the detainee before the detainee has any realistic opportunity to consult counsel, the detainee does not have the right to delay the production of the breath sample in order to consult counsel by virtue of the ready availability of a telephone. However, where an officer is not in a position to require that a breath sample be provided immediately after a demand for such a sample, the court, in determining whether the detainee

> had a realistic opportunity to consult counsel during the period of delay, must consider the ready availability of a telephone as a relevant factor in making that determination.

[27] The Court of Appeal upheld the trial judge's ruling that the officer's failure to advise the defendant of his s.10(b) rights was a Charter violation which, in the circumstances, resulted in the exclusion of the breathalizer results. The Court also stated, following the approach set out in **Cote** and **Latour**, that the demand had been unlawful.

[28] There are numerous decisions of trial courts in Ontario on this point, some of which have dealt with this issue as a Charter violation while others have dealt with it as a question of lawful demand. The question has been raised whether the latter is an argument open to the defense, e.g., in **R. v. Helm**, [1992] O.J. 775, Fairgrieve, PDJ, held that the earlier decision of the Court of Appeal in **Cote** should not be interpreted as establishing a rule for assessing the validity of a s.254(2) demand. He stated that, if that were the proper interpretation, it would lead to the unreasonable conclusion that a peace officer's authority to make a demand would vary according to the availability of counsel or a telephone to contact counsel.

[29] The Nova Scotia cases of **Debaie** and **Snow**, previously cited, appear to adopt the law as set out in **Cote**.

[30] In **R. v. George Tsavos**, an unreported decision of His Honour Sherar, PCJ, now on summary conviction appeal SH254143, the defendant was stopped within a block of the Halifax police station. After having him perform sobriety tests, the police gave him a s.254(2) demand. The screening test was administered at roadside resulting in a fail. He was then given a breathalizer demand and taken to the station where he blew over. In these circumstances, Judge Sherar held that there had been a violation of the defendant's s.10(b) Charter rights and excluded the breathalizer results. He did not address the question of lawfulness of the demand.

[31] In **R. v. Smith**, [1994] N.S.J. No. 485, the NSCA stated at p.6:

> ... [I]f a person is detained prior to the demand, the rationale in Thomsen does not apply. A person so detained is entitled to be informed of his rights under s.10(b) of the Charter without delay...

[32] The Court in **Smith** did not address the issue of lawful demand.

[33] I am inclined to the view expressed by Fairgrieve, PDJ, in **Helm** that the authority of an officer to make a s.254(2) should not be affected by the availability of counsel. Rather, the availability of counsel should be considered on a Charter motion for exclusion of evidence. However, given the current state of the law, I will proceed on the basis that the defense may challenge the lawfulness of the demand or raise a Charter argument based on a failure of the police to advise the defendant of their s.10(b) rights when, in the circumstances, there was a reasonable opportunity for the defendant to consult counsel.

[34] In this case, when Constable Geoffrion made the demand, she was in a position to immediately administer the test. There was not a reasonable opportunity for the accused to consult counsel after the demand. Before the demand, the accused was in the police presence for approximately ten minutes and I find that a phone was readily accessible. While the defendant was in the interview room, I find that there was a reasonable opportunity for her to have contacted counsel while Constable Geoffrion was retrieving the approved screening device. However, the defendant was not detained during that period of time.

[35] In my view, the underlying rationale for the ruling in **Cote** was the protection of the accused's Charter rights. Citizens operating motor vehicles retain their rights under the Charter. In certain circumstances, a citizen's right to counsel may be temporarily suspended. One such circumstance is where an officer, pursuant to s.254(2), makes a demand within the parameters of the legislation. The prerequisites of a lawful demand under s.254(2) include that the officer has a reasonable suspicion that the citizen has alcohol in his or her body, that the citizen was recently operating or in care or control of a motor vehicle and that the officer can provide the citizen an opportunity, forthwith, to provide a sample of his or her breath for testing using an approved screening device. In my view, where the citizen is being detained, and only then, it may also be a prerequisite that if, in the

circumstances, there is a reasonable opportunity for the defendant to consult with counsel, then the officer must advise the citizen of his or her s.10(b) Charter rights and provide him or her a reasonable opportunity to exercise those rights.

[36] In my view, in the unusual circumstances of this case, where the defendant was not detained, there is no requirement that the demand be made in circumstances where there is not a reasonable opportunity for the defendant to consult counsel.

[37] I find that the demand made to the defendant by Constable Geoffrion was lawful.

**Charter Violation**

[38] As to whether there was a violation of the Charter, I have considered the entire period of time from the end of the driving of the motor vehicle until the demand was made but, in particular, the period of minutes when the defendant was in the interview room at the police station before the demand was made when there was, on the evidence, ready access to a telephone. While Constable Geoffrion was engaged in related duties, i.e., retrieving the screening device, this period could be viewed as a period of delay prior to a demand being given. As noted previously, the NSCA dealt with this issue in **R. v. Smith**. In **Smith**, where the defendant was detained during a period of delay before the demand was given, the court held that he must be advised of his s.10(b) Charter rights without delay. In the present case, I have found that the defendant was not detained after the grounds for a demand were noted and before the demand was made. In these unusual circumstances, where the defendant was not detained, I find that the police were under no obligation to advise her of her s.10(b) Charter rights.

[39] While that resolves this case, let me add that had I concluded that the delay in the demand being given necessitated the officer advising the defendant of her s.10(b) Charter rights and not doing so constituted a violation thereof, I would not have excluded the evidence of refusal by the defendant even though such evidence was conscriptive. The outcome of a s.24(2) Charter analysis in cases occurring in Nova Scotia has differed depending on the

facts of the case (see **R. v. Debaie** (evidence excluded), **R. v. Snow** (evidence not excluded), and **R. v. Tsavos** (evidence excluded)). In **Snow**, the transcript reveals the factors the Judge considered in her s.24(2) analysis. In the other two cases, I have insufficient information regarding the judge's reasons.

[40] On an application for Charter relief under s.24(2) in the present case, it would be my view that, given the current state of the case law, it could not be said that Constable Geoffrion ought to have known to advise the defendant of her s.10(b) Charter rights in such circumstances. Further, in my view, Constable Geoffrion acted in good faith in proceeding as she did and was not intent on circumventing Charter requirements. The nature of the charge involves concerns of drinking and driving with all the related dangers to the public. The evidence sought to be excluded is key to the Crown's case. Taking these factors into consideration, I would have held that it had not been established that, having regard to all the circumstances, the admission of the evidence of refusal in these proceedings would bring the administration of justice into disrepute.

**Conclusion**

[41] I find the defendant to have been proven guilty as charged.

Dated at Halifax, Nova Scotia, this ____ day of _____ 2005.

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Judge Marc C. Chisholm