

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Doran, 2010 NSPC 79

Date: 2010 December 17

Docket: 2112093

Registry: Dartmouth

Between:

Her Majesty The Queen

v.

Alexandra Doran

Revised Decision: The text of the original decision has been corrected on March 10, 2011 replacing the name of counsel listed as Mr. Levesque with Mr. James Giacomantonio. This decision replaces the previously released decision.

Judge: The Honourable Judge Castor H. Williams

Oral Decision: December 17, 2010

Charge: Criminal Code Section 253(1)(b)

Counsel: Mr. James Giacomantonio, for the Crown
Mr. D. Murray, for the Defence

By the Court:

Introduction

[1] The police have charged Alexandra Doran with impaired driving and also with care and control of a motor vehicle when her blood alcohol level exceeded the legal limit. She now asserts that the police breached her *Charter* right to retain and instruct counsel without delay and her right to be informed of the right to counsel. As a result, she seeks to exclude any and all evidence obtained following the alleged breach. This case is therefore an examination of the Constitutional issues raised and whether, in the circumstances, the accused is entitled to any specific *Charter* remedies.

Overview

[2] At 0130 hours on October 18, 2009, Cpl. Calvin Byard of the Royal Canadian Mounted Police, Cole Harbour Detachment, was in a marked police unit patrolling the Cole Harbour area in the Halifax Regional Municipality. It was a clear night and traffic was light. However, when he was travelling on Caldwell Road and had stopped at the intersection of Cole Harbour Road, he observed a dark coloured Toyota SUV,

with lights on, parked against the curbside in the parking lot of a Petro Can gas station that was located to his right. What caught his attention was the fact that the vehicle was parked in a manner that obstructed the exit of the car wash area that he thought was irregular.

[3] He decided to investigate. Driving slowly he approached the parked vehicle. As he closed in, he noticed that the reverse lights were activated and that the vehicle moved backwards. Thereupon, he activated his emergency lights and tapped his manual siren. This caused the vehicle to stop abruptly. Now, with a flashlight in hand and on foot, he went to the driver's side of the stopped vehicle and saw a cloud of smoke wafting through the open window. It was now 0150 hours. He told the female driver - the accused- to extinguish her cigarette or move it and, with his head near the window, he immediately detected the smell of alcohol emanating from her breath as they conversed. Also, he noted that she was talkative and had bloodshot eyes.

[4] Thereupon, he asked her to get out of her vehicle and as well he explained to her, which she acknowledged that she understood, that she was detained for the purposes of a roadside screening device test. Subsequently, at 0152 hours, after formulating the opinion that she was operating a vehicle after she had consumed

alcohol, he demanded she take the roadside screening device test. She took and failed the test. Explaining to her the meaning of the results of her failure and ensuring that she understood, he then arrested her for impaired driving.

[5] Further, at 0153 hours he read, repeated and explained her right to counsel and the availability of Legal Aid and duty counsel and, to all this information, she said that she understood. In addition, he read to her the police caution that she also indicated she understood. Notwithstanding, when he asked whether she wanted to call a lawyer, she said, "No."

[6] Upon reading her the breathalyser demand which she also stated that she understood, she agreed to accompany him to the Cole Harbour Detachment for the purposes of giving her breath samples to a certified breath technician. They left the stopped scene at 0200 hours and arrived at a secure bay at the police station about two to three minutes later.

[7] On their arrival at the station the accused continued to be talkative and when she walked the officer observed that she was unsteady on her feet. Likewise, he informed Cpl. David Pike, a certified breath technician of thirty years experience, why

he had arrested her and that he had Chartered and cautioned her, made the breath demand, and that she had declined to speak to duty counsel.

[8] Taking her into his custody, Cpl. Pike noted that although the accused was talkative she knew where she was and the reasons for her presence at the police station. Additionally, he observed that she had slurred speech, an odour of liquor from her breath and bloodshot eyes. From these observations, he formed the opinion that her ability to operate a motor vehicle was impaired by either alcohol or a drug. He asked her whether she understood the breath demand that was made to her. She responded that she understood. As well, he asked her whether she understood her rights to counsel. She said that she did. Then, he asked her whether she wanted to speak to counsel. The officer testified that her response was that: "It all depends if she is to be released." Furthermore, he testified that he understood her words to mean that it depended on if she was being released or being held then she would make a decision to contact counsel. She would wait and see. But, subsequently, she neither made any further comments nor probed the issue about contacting counsel.

[9] Following this conversation he administered the tests and received her adequate breath samples in an approved device. He recorded the result of the breath test on the

Certificate of a Qualified technician, now Exhibit No.1, that he delivered to Cpl. Byard.

Finding of facts and Analysis

[10] Here, I find that the arresting officer, Cpl. Calvin Byard, formulated the belief that Doran was operating a motor vehicle after she had consumed alcohol and that this would have affected her driving ability. Furthermore, I find that he noted that she had bloodshot eyes, was talkative and that the smell of alcohol emanated from her breath when she spoke. Likewise, I find that he made a roadside demand and that she failed the roadside screening device test. Additionally, I find that he arrested her for impaired driving, advised her of her rights to free and immediate legal advice and Chartered and cautioned her. Similarly, I find that Doran indicated to him that she understood her right to counsel but that she did not wish to speak to a lawyer.

[11] In addition, I find that Cpl. David Pike was a qualified breath technician of thirty years experience. I accept and find that he received information from Byard about the circumstances of Doran's arrest, the breath demand and that she had declined to speak to duty counsel. As well, I find that Pike observed that Doran's

speech was slurred, that she had bloodshot eyes and an odour of liquor came from her breath. I find that he formulated that opinion that her ability to operate a motor vehicle was impaired by either alcohol or a drug. Also, I find that she informed Pike that she understood her right to counsel and when asked if she wanted to call counsel responded that it all depended upon if she were to be released.

[12] The Defence averred that Doran's response was not a clear and unequivocal waiver of her right to counsel. Similarly, as time was not a factor, the police should have clarified what she meant. Thus, from this perspective the police failed in their duty to inform Doran of her right to counsel in a meaningful manner and her tests' results ought to be excluded.

[13] On the other hand, the Crown submitted that the police discharged their responsibilities by informing Doran of her constitutional rights in a manner that she understood but that she was not diligent in the exercise of those rights. She was fully aware of her situation but showed no interest in exercising her right to contact counsel. Therefore, from this perspective there were no Charter violations and the breathalyser tests ought not to be excluded.

[14] I have reviewed the many case authorities that counsel referred to and have submitted. On my review of those authorities I conclude and find that Doran had a responsibility to be diligent in the exercise of her informed right which she clearly said that she understood. No evidence was presented on her behalf to explain or to elucidate what she meant when she said that her calling a lawyer would depend on whether she would be released. I find that Pike's interpretation of her answer as a waiver was reasonable. In my opinion, it is also reasonable to conclude and I conclude and find that she clearly understood that she had the right and could call a lawyer before she took the test and that Pike's subjective belief that she had waived her right to call a lawyer was based upon objectively reasonable grounds.

[15] Also, it is reasonable to conclude that from her statement she was more concerned about her being detained after she took the test. As a result, it reasonably could be inferred that she was unsure of her ability to pass the test and that she was adopting a wait and see position. Also, I find that it is reasonable to infer and conclude, from her stated demeanour, that it may well be the situation that she considered the test as a necessary inconvenience and that only if she were to be detained would she require the services of a lawyer.

[16] Consequently, in my opinion and on the evidence presented, she made an informed choice and a clear decision. Knowing full well her rights to instruct and retain counsel without delay, and although that choice was neither articulated nor put to her, she, on her own free and operating mind, made the clear determination that if the tests were negative and she were to be detained only then would she require the services of a lawyer. The reasonable inference was that otherwise she would proceed with the tests.

[17] Thus, it is clear, on the evidence presented, and, I find that there was no indication that she was under any misapprehension that, if she wanted to, she could have immediate and private access to free legal advice. Moreover, I find that there was no evidence that she was confused with respect to her right to counsel. As well, I find that the police treated her fairly and fulfilled their informational and implementational duties and that Doren had a reasonable opportunity to exercise her right to counsel.

[18] Likewise, I find that the police refrained from taking her breath samples until she had a reasonable opportunity to retain and instruct counsel. What is more, I find that she did not invoke her right to counsel, or, if it could be said that her statement meant that she wanted to instruct and retain counsel, then I find that she was not

reasonably diligent and that the police implementation duty either did not arise in the first place or was suspended.

[19] Consequently, I find that, in the circumstances, no infringement of her right to counsel is made out and that Doren clearly expressed a valid and unequivocal waiver of her right to counsel before the police took her breath samples. As a result, the Certificate of the Qualified Technician will be admitted.