IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. McKay, 2007 NSPC 72

Date: December 12, 2007
Docket: 1667367 & 1667368
Registry: Halifax

Her Majesty the Queen

v.

David Eugene McKay

DECISION

Judge:	Jamie S. Campbell
Heard:	October 26, 2007
Oral decision:	December 12, 2007
Charges:	Criminal Code Section 253(B) and 253(A)
Counsel:	Crown - Christopher Morris Defence - Robert Cragg

By the Court:

[1] In 2006, Michael Turner's birthday party was crashed in a most spectacular way. In the early morning hours of June 4th, he was in his home in Halifax, celebrating with his wife and some friends. They heard a loud noise. When he went outside to see what had happened, he saw a person sitting in a large black Dodge truck. The truck had smashed into the side of his house. It was not a minor collision. The house had been moved on its foundation. The damage turned out to be in the area of $70,000.00. He asked his wife to call 911.

[2] The driver of the truck was the accused, David McKay. He has been charged with offences under sections 253(a) and 253(b) of the Criminal Code.

[3] When Mr. Turner came back outside, he saw Mr. McKay using his cellular telephone. He asked the accused for his name. Mr. McKay told him not to worry because he wasn't going anywhere. To Michael Turner, Mr. McKay did not appear to be agitated or drunk. He did, not surprisingly, seem to be rather worried.

[4] Constable Clyke of the Halifax Regional Police was dispatched to the scene at 1:46 a.m. He arrived at 1:51 a.m. Trucks from the fire service had already arrived on the scene.

[5] The constable approached the accused who identified himself as the driver of the vehicle. Constable Clyke could smell alcohol from Mr. McKay's breath. Without

being asked any questions, Mr. McKay said that he had been driving a friend home and had backed out of a driveway. He also said that the truck that he had been driving had a lot of power.

[6] Mr. McKay had known Constable Clyke during their university years. Mr. McKay told him that he was not going to lie to him. He said that he had drunk four or six beer that night. A voir dire was held to determine whether the statements made by Mr. McKay were made voluntarily. Nothing in the surrounding circumstances would give rise to an inference that the statements were involuntary.

[7] At 2:00 a.m. Constable Clyke gave Mr. McKay the police warning and caution. At 2:03 a.m. he read him the breath demand. At 2:05 a.m. he read him a further caution.

[8] At that time Constable Clyke believed that Mr. McKay was impaired. While he was both polite and cooperative, and remained so throughout the process, there was a strong smell of alcohol. There was of course also an accident for which no blame could have been attributed to the house. Mr. McKay himself had commented on how much he had had to drink.

[9] Constable Legere arrived on the scene at 2:20 a.m. He seized the vehicle and found an opened and unfinished bottle of Keith's beer in its centre console. That was information that Constable Clyke would not have had in coming to his conclusion

about whether Mr. McKay was impaired. There was however ample evidence for Constable Clyke to have had reasonable grounds for making the breath demand.

[10] At 2:23 a.m., Constable Clyke arrived with Mr. McKay in booking. There were no delays in getting from the scene to the police station.

[11] Mr. McKay was taken to the holding room at the booking section of the police station. At 2:30 a.m. the breath technician, Constable Oosteven, was called to go to the main police headquarters, the David P. MacKinnon Building, on Gottingen Street in Halifax.

[12] At 2:40 a.m., Mr. McKay asked to use the washroom. Constable Clyke accompanied him and monitored him during that time.

[13] At 2:45 a.m., Constable Oosteven arrived at the booking section. From there he was able to observe Mr. McKay.

[14] At 2:52 a.m., Constable Clyke turned Mr. McKay over to Constable Oosteven. Constable Oosteven noted a strong smell of alcohol. He noted that Mr. McKay's face was flushed, his eyes were bloodshot and that he was unsteady on his feet.

[15] The first breath test was administered at 3:05 a.m. The result was 130 milligrams of alcohol in 100 millilitres of blood. The second test was administered

at 3:22 a.m. The result was 120 milligrams of alcohol in 100 millilitres of blood. The tests showed results that were both over the legal limit of 80 milligrams per millilitre.

Issues:

[16] Mr. Cragg argued on behalf of Mr. McKay that the breath test in this case was not given forthwith or as soon as practicable. He asserts that the delay between the demand and test was unexplained.

[17] It was also argued that while breath tests must be administered at least 15 minutes apart, there was no explanation of exactly how the first test had been completed and what had been done to administer the second test.

Law:

[18] Mr. Cragg provided a substantial volume of case law to support the view that even rather brief delays can amount to a breach of the requirement that the test be undertaken as soon as practicable after the demand is made. The issue is whether the delay is unreasonable in the circumstances.

[19] Section 254(3) of the Criminal Code provides that where a police officer believes, on reasonable and probable grounds, that a person is committing an offence under section 253, or has within the previous three hours committed such an offence,

the officer may demand a breath sample. The demand is that the person provide the sample "then or as soon thereafter as practicable".

[20] In order to preserve the presumption that the test is accurate, with regard to its measurement of the blood alcohol level at the time of the alleged commission of the offence, the test must be done within two hours of the police officer having reasonable and probable grounds to believe that the offence had been committed. Two tests must be completed. They must be administered at least 15 minutes apart. Time then, is of the essence.

[21] Alcohol concentration in the blood is measured while alcohol is being absorbed and eliminated. When the tests are administered matters.

[22] The question is what "as soon as practicable" means. Practicable is a word more likely to be used in a legal context than in daily speech. It means that something is capable of being achieved using existing means and resources.

[23] As soon as practicable does not mean as soon a possible. It has the important element of taking into account existing resources and surrounding circumstances. It is defined having regard to the legislation involved, the context of the particular case and reasonable practical considerations.

[24] Here, the legislation contemplates a situation where time is important. It is important not only in the sense that a person should not be detained for a period that

is longer than necessary but because fluctuating alcohol levels in the blood are being measured.

[25] While that is the case, the legislation is practically applied in vastly different situations. Upon a breath demand being made, some drivers are cooperative and polite, like Mr. McKay. Others are not. At some times and in some places a qualified technician is available immediately. Sometimes a person must be called to come from somewhere else.

[26] The police must reasonably account for the time between the demand and the completion of the test. Unaccounted for gaps of time or gaps of time for the which the explanation itself is not reasonable will result in the finding that the test was not administered as soon as practicable.

[27] Most of the cases in the extensive list provided by Mr. Cragg appear to fall within one of those two general categories. In the first category, there is an unexplained gap in the narrative. In those cases there is simply no evidence as to what happened or what was happening during the time in question. The court cannot take judicial notice of what could have been happening or what would normally be happening during that period.

[28] For example, in R. v. Trempe (1992),111 N.S.R.(2d)317 (N.S. Co. Ct.) there was an unaccounted for delay of 32 minutes after the accused was turned over to the breath technician.

[29] In R. v. Porter (1981), 64 C.C.C. (2d) 283 (Nfld. C.A.) there was a delay of 51 minutes between the time of the demand and the test. There was no evidence to explain what had occurred during those 51 minutes.

[30] In McCoy v. The Queen, [1990] S.J. No. 657 (Sask. Q.B.) The accused person waited 44 minutes in the police station before providing the first sample. There was no explanation for the delay.

[31] In R. v. Cassidy SBW 19252 (S.C.N.S) there was a 28 minute delay from the time the accused person was turned over to the breath technician.

[32] In R. v. Cook (N.S.S.C.) [1994] N.S.J. No. 148 there was an unexplained delay of 20 minutes over the mandatory 15 minute waiting period between the taking of the two breath samples.

[33] In R. v. Mark Edward Fletcher, NSPC # 657683/657684 there was a period of 40 minutes for which there was simply no explanation. While the court could piece together about 20 minutes based on what might have taken place, there was a further 20 minutes for which no explanation at all was offered.

[34] In R. v. Babineau, NSPC #781599/781600 there was a period of 50 minutes from the time the demand was read until the first sample was taken. While there was evidence that the accused had been searched and had spoken with a lawyer, there was no detail provided as to how long these activities took.

[35] In R. V. Forbes, NSPC 1987, PCBW 87-2339 there was approximately an hour and a half that was unaccounted for. Judge Kennedy, as he then was, stated that he could presume as to how some of the time might have been used but that it had not been specifically accounted for.

[36] In R. v. Covey, NSPC 1989, PBW-89-1808 once again, then Judge Kennedy dealt with a situation in which a significant period of time was unaccounted for. The accused was given a breath demand and left for the RCMP detachment at 3:02 a.m. He arrived at 3:21 a.m. He was given an opportunity to speak with counsel which was found to provide a "general explanation" for the period from 3:21 to 3:40 a.m. The evidence did not disclose however what happened between 3:40 and 3:58 a.m. when the test was administered. The judge speculated on whether he might be able to take judicial notice of the 15 minute waiting period to accomplish the preparation of the breathalyzer machine and concluded that he could not. Given that there was no evidence of what transpired during that time, he held that the crown had not shown that the test had been administered as soon as practicable.

[37] In R. v. Mathew Finney, NSPC 1990 the court dealt with a gap of time amounting to 20 minutes. The conclusion was that there was no evidence at all of what had taken place. Judge Curran commented on the level of evidence that might be required:

> " It really doesn't take very much to show how time is used... I think its enough to say things from which the court can conclude that time was

> used and was reasonably used... As I say, I don't think very much evidence is needed. Very, very little would do the trick."

[38] In each of these cases there was an absence of evidence which left a period of time unexplained. In each case it was not a question of whether the time in question was reasonable for the performance of a certain activity. The issue was the lack of any evidence as to what was being done during that time.

[39] The second category of cases involves those in which the time has been accounted for, but where the explanation is not considered to be reasonable.

[40] In R. v. Pauls [1994] A.J. No. 289 there was a 25 minute delay caused by the police officer waiting for the arrival of a roadside screening device. He had already formed the necessary opinion to require the accused to provide a breath sample. There was no need to wait for a screening device. That was a case in which the time was accounted for but where the explanation itself was not reasonable.

[41] In R. v. Bissett [1993] O.J. No. 2319 the officer who was responsible for taking the breath samples had not determined at the beginning of his shift that his equipment was functioning properly. When it turned out that it was not working, only then did he discover that the backup instrument was off the premises for repairs. That meant that the accused had to travel to another detachment in order to provide the samples as required. The detachment to which he was taken however was not the closest one where the tests could have been done. While the time involved was not great the explanation was not reasonable.

[42] In R. v. Rafuse NSPC # 797823/797824 there was evidence that while taking Mr. Rafuse to the police station the officer stopped another vehicle. There was no evidence about whether that stop was required for pubic safety. The crown in that case had not accounted satisfactorily for a period of 37 minutes between the time of the demand and the test.

[43] In each of those cases, the time involved was accounted for but the actions of the police involved were held not to be reasonable in those specific circumstances.

[44] The time involved in each case can be parsed to almost infinite detail. In that sense, it is an elastic argument. It can be made, in theory, to fit almost any case.

[45] Any period of time can be broken down into shorter periods for which an explanation can, in theory, be required. Each activity can be broken down into its component parts and a specific time period required for each.

[46] It could be reduced to the absurd if the police had to account for each period of seconds or minutes or if they were required in each case, to provide a time line for the actions of walking to the police vehicle, getting in the police vehicle, walking from the vehicle to the station, gaining access to the station, walking from the door to the booking area and so on. That is not required.

[47] There should be no unreasonable gap in the narrative. Even a brief period of time for which the police cannot provide evidence generally of what was happening will come under scrutiny.

[48] When the police do provide that evidence it should show that the activities undertaken were reasonable in the circumstances and were undertaken within a reasonable time in light of the fact that time is of the essence.

[49] A vast body of case law has developed so that almost every detail of the process has been the subject of some form of judicial comment. The police in dealing with these matters must be meticulous in their attention to detail. The Crown in prosecuting them must be sure not to omit any relevant piece of information. At the same time, the practical realities of law enforcement should be acknowledged.

[50] The determination of the level of detail required should be reasonable, which means that it should take into account both the technical nature of the process and the practicalities associated with it. The police and the Crown must be held to a high standard, bearing in mind both the need for timeliness in preserving the integrity of the testing process and the rights of the person detained. The standard should be determined based on those considerations and the need to properly address them.

[51] "As soon as practicable" cannot be defined using a stopwatch or a chronometer. It is not a scientific measurement. It is not a theoretical concept. It is a time period that is measured based on the practical common sense consideration of the

circumstances of the individual case, having regard for the reasons why time is of the essence.

[52] Constable Clyke read the breath demand to Mr. McKay at 2:03 a.m. This was done at the sight of an accident where Mr. McKay's vehicle had crashed into a house. Without delay, in those circumstances, Constable Clyke got Mr. McKay to the booking section of the police station in Halifax in 20 minutes. They arrived at 2:23 a.m.

[53] In the circumstances, that 20 minute time is entirely reasonable. It is not necessary to provide a moment by moment description of the drive unless it has taken longer than might be expected.

[54] Constable Oosteven was dispatched at 2:30 a.m. and arrived at 2:45 a.m. Every police station does not have a breath technician on duty at all times. Here Constable Oosteven was dispatched from Dartmouth and arrived without delay. During the time that it took him to arrive, Mr. McKay asked for and was given the opportunity to go to the washroom. That process was properly documented.

[55] Upon Constable Oosteven's arrival, he observed Mr. McKay for about 20 minutes. There is nothing unreasonable in that. The time, once again, was recorded.

[56] He performed the first test at 3:05 a.m. Again, there was no unreasonable or unexplained delay.

[57] In this case, the Crown has accounted for the entire period from the demand to the test. There is no period of time during which the police could not reasonably describe what was happening.

[58] The drive to the police station was done without delay. The breath technician was dispatched and arrived without delay. Upon his arrival the tests were completed without delay.

[59] With regard to the second issue, there is evidence that the first test was completed and the second test commenced after a delay of at least 15 minutes but not an unreasonable delay. It was argued that the Crown did not lead evidence as to exactly how his first test was completed and how the second test was commenced. While the time was entered as to when the test was completed, it was argued that it was not clear whether this referred to the time of the reading or the time when the test itself was completed. It was also argued that there was no evidence to indicate when the second test was commenced. The time refers to it's completion.

[60] The evidence of Constable Oosteven and the Certificate of a Qualified Technician provide proof of the times involved. There was no question raised in cross examination and no evidence led to raise any doubt as to the accuracy of the times when the two tests were done. They were done at least 15 minutes apart, as required. There was no delay beyond that.

[61] I find Mr. McKay guilty of the offence under s. 253(b).

Judge Jamie S. Campbell

Judge of the Provincial Court