PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v Garland*, 2020 NSPC 47

Date: 20201126
Docket: No. 8415382
Registry: Sydney

Between:

HER MAJESTY THE QUEEN

v.

DEVYN SCOTT GARLAND

LIBRARY HEADING

Judge:	The Honourable Judge Diane L. McGrath
Heard:	November 6, 2020 in Sydney, Nova Scotia
Written Decision:	November 24, 2020
Subject:	**Impaired Operation, Refusal, Roadside Screening / Field Sobriety Testing**
Summary:	**Accused was stopped for speeding. Officer detected a smell of an alcohol beverage coming from his breath and made a demand for the accused to perform standard field sobriety tests. Officer and accused waited 20+ minutes for another officer to arrive and conduct the tests. Subsequent breath demand was predicated on the smell and the accused's poor performance of the tests. Crown conceded no evidence to support s. 320.14(1)(a) but proceeded with charge pursuant to s. 320.15(1) C.C.C.**
Issues:	Time requirements / limitations of s. 320.27 of the *Criminal Code* with respect to administering roadside sobriety testing / screening devices.

Result: Requiring the accused to wait twenty minutes for the arrival of another officer to perform standard field sobriety tests does not comply with the requirement in s. 320.27 of the *Criminal Code* that such testing must be done "immediately". Subsequent demand was predicted on the results of the testing and therefore invalid.

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Decision	November 24, 2020
Charge:	320.15(1) *Criminal Code of Canada*
Counsel:	Lisa MacPhee, for the Crown William Burchell, for the Defendant

By the Court:

[1] On November 30, 2019, the black SUV Devyn Garland was driving came to the attention of Constable James Penny of the Cape Breton Regional Police Service as it appeared to be travelling at a high rate of speed through the former town of North Sydney in the Cape Breton Regional Municipality.

[2] Constable Penny pulled Mr. Garland over without incident in the parking lot of a nearby business. The only noticeable aspect of Mr. Garland's driving was the apparent rate of speed.

[3] As Constable Penny was speaking with Mr. Garland he detected the odour of an alcohol beverage from his breath. As a result of the presence of this odour Constable Penny requested that an officer trained in administering standard field sobriety tests attend at his location.

[4] Constable Penny was not trained in administering standard field sobriety tests nor was he able to administer a roadside screening test as the devices available for that purpose are not used by the Cape Breton Regional Police Service.

[5] The only officer trained to administer field sobriety testing on shift that evening was Constable Cory MacKenzie who was on shift in the Central Zone of

the Cape Breton Regional Municipality. Constable MacKenzie arrived at the location where Constable Penny had Mr. Garland pulled over approximately 20 - 25 minutes later.

[6] Constable MacKenzie administered the standard field sobriety tests and advised Constable Penny that Mr. Garland had performed poorly. As a result of that information Constable Penny formulated his grounds that Mr. Garland's ability to operate a motor vehicle was impaired by alcohol and provided the requisite demand, warning, and rights to counsel.

[7] Once back at the detachment Mr. Garland exercised his right to counsel and was placed in the breath testing room. Following six unsuccessful attempts to provide a breath sample he was charged with refusal. He was also charged with impaired operation of a conveyance.

[8] Following trial, the Crown invited a finding of not guilty on the impaired operation charge but argued for a conviction on the charge of refusal.

[9] Mr. Garland's position is that the refusal charge cannot stand. Mr. Garland argued the police failed to perform the roadside testing "immediately" as required by s. 320.27(1)(a) of the *Criminal Code*, thus rendering the demand invalid. He

argued that the subsequent charge pursuant to s. 320.15 of the *Criminal Code* must result in an acquittal as a precondition to a valid refusal charge is a lawful demand.

[10] Prior to the imposition of s. 320.27 in 2018 the provision of the *Criminal Code* dealing with the administering of roadside testing in cases of suspected impaired drivers provided that such testing had to be conducted "forthwith". Although there has been a change in the language used by Parliament, it is clear that such was done as a means of simplifying the law.

[11] The Supreme Court of Canada in *R. v Woods* [2005] 2 S.C.R. 205 held that "forthwith" means immediately or without delay. This was in keeping with the Court's 1991 case of *R. v Grant* found at [1991] 3 S.C.R. 139 which held that the use of the word "forthwith" suggested that the sample be provided immediately.

[12] In looking at the interpretative history of the former s. 254 of the *Criminal Code* it is clear that by using the word "immediately" Parliament intended to simplify the language and codify the case law in this area as it has developed.

[13] Forthwith, immediately and without delay all mean the same thing; thus the case law as it developed under the old s.254 of the *Criminal Code* is equally as informative today as it was prior to the amendments.

[14] It is worth noting that s. 320.27 of the *Criminal Code* allows a peace officer to detain an individual for mandatory alcohol screening on mere suspicion that the individual has alcohol in their body. The caveat provided is that the screening must be done immediately, not as soon as practicable, but immediately.

[15] The word immediately is defined by the Oxford Encyclopedic Dictionary as "without delay".

[16] The threshold for this investigative procedure is so low that balance is only achieved by ensuring that an individual's detention in such cases is of the briefest possible duration.

[17] Once a peace officer has reasonable grounds to believe that an offence has been committed, however, and a lawful breath or blood demand is made, the time for administering that testing is "as soon as practicable" and the detained individual is afforded all the rights of a lawfully detained person, including the right to counsel.

[18] In the present case, Mr. Garland was detained at the roadside for 20+ minutes while waiting for another officer to attend to administer a standard field sobriety test. He was detained on mere suspicion that he had alcohol in his body.

[19] While the law provides for individuals in Mr. Garland's position to be detained for the administration of roadside screening or testing, such screening or testing must be done immediately, it must be done without delay.

[20] As the Supreme Court of Canada held in *Grant (supra.)* that waiting 30 minutes for an officer to arrive with a roadside screening device does not constitute "forthwith" so must this Court decide that waiting 20+ minutes for another officer to arrive to administer a field sobriety test does not constitute immediately.

[21] If the police wish to avail themselves of the investigative powers conferred on them by the *Criminal Code*, they must also comply with the requirements of the *Criminal Code*. Where the ability to perform the testing immediately does not exist, the police are unable to rely on the power to conduct such testing as set out in s. 320.27 of the *Criminal Code*.

[22] Consequently, this Court finds that the inability of Constable Penny to administer a roadside test immediately upon forming his suspicion in relation to Mr. Garland rendered his demand unlawful. Given that Constable Penny testified that the subsequent breath demand was predicated on the results of the field sobriety testing, this Court further finds that demand to be invalid and thus the subsequent refusal charge cannot stand.

[23] Defence counsel raised two other arguments with respect to the sufficiency of the charge as worded in the information as well as the Crown's failure to prove the proper functioning of the breath machine's mouthpiece at the time the tests were administered. As a result of the Court's finding on the validity of the demand, I will leave those arguments for another time.

Conclusion

[24] Mr. Garland, on the charge of refusal as set out in the information before this court I find you not guilty. Having already accepted the Crown's invitation to dismiss the impaired charge this concludes these matters and you are free to go.

Diane L. McGrath, JPC