PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Paradis*, 2021 NSPC 3

Date: 20210114
Docket: 8397058, 8397059
Registry: Kentville

Between:

Her Majesty the Queen

v.

Nicholas Paradis

TRIAL DECISION

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	January 8, 2021, in Kentville, Nova Scotia
Decision	January 14, 2021
Counsel:	William Ferguson, for the Crown Nicholas Paradis, self-represented

By the Court:

[1] Late on the evening of October 27, 2019, Constable Tamu Bracken was parked in a marked police cruiser watching for possible impaired drivers leaving the local bars. She observed what would turn out to be an electric bike weaving down the middle of the street.

[2] She stopped the bike, identified the driver as Mr. Paradis and noted a smell of alcohol emanating from his mouth. After Constable Bracken read the approved screening device demand pursuant to section 320.27(1)(b) of the *Criminal Code of Canada*, Mr. Paradis accompanied her to the cruiser where she had an Alcosensor. After nine unsuccessful attempts to provide a sample, Mr. Paradis was charged with impaired operation of a motor vehicle and failing to provide a sample of breath, contrary to sections 320.14 and 320.15 CC, respectively.

[3] Mr. Paradis represented himself at the trial and elected not to call evidence after hearing the Crown's sole witness, Cst. Bracken.

[4] After closing submissions, I queried whether Cst. Bracken's testimony had established the Alcosensor as an approved screening device. I reserved decision to listen to a portion of the record and consider the issue.

Decision:

[5] There was no evidence the Alcosensor is an approved screening device. Unlike refusal cases, failure to provide a sample after many attempts to do so, requires proof of the legality of the device. On these facts a conviction cannot be registered.

Findings:

[6] Cst. Bracken was a credible witness who provided solid answers to all the questions posed to her. She was frank and fair, prepared to concede when she did not recall something and gave detailed answers when provided the opportunity.

[7] On her evidence I find that the vehicle she stopped was, as she described, a cross between a scooter and an electric bike, something a handy person might put together. It did not have a serial number, a licence plate, or lights and she could not recall if it had a key. While she could not describe the sound coming from the bike, there was one and so she concluded it was electrically powered and as a result met the definition of a conveyance in section 320.11 of the *Criminal Code*.

[8] On cross examination Mr. Paradis showed the constable a photograph purported to be the bike he drove that night. She agreed there appeared to be lights on the pictured bike, however maintained her belief that it did not have lights

turned on when she saw it. Asked if it was possible, she emphasized there were none on the rear.

[9] Cst. Bracken read the ASD demand at 1:14 am, Mr. Paradis indicated his understanding and accompanied her to the police vehicle where she had an Alcosensor. In examination in chief, she offered to provide the Crown the model number, but he declined to ask for it and instead asked other questions. She testified the Alcosensor came from her "office" and she is trained to use it.

[10] She testified that one generally tests the device to ensure it is working properly by turning it on. The machine automatically proceeds through a series of tests, indicating readiness by displaying the word "blow" on the screen.

[11] More specifically she said the Alcosensor she used that night was operational and in working condition.

Efforts to Obtain a Sample:

[12] Cst. Bracken gave "Mr. Paradis instructions for blowing on the unit"- "take a deep breath, keep a steady blow until told to stop, and do not put your tongue on the mouthpiece". She explained that she knew when to tell him to stop blowing

because the instrument beeps upon obtaining a proper sample. Cst. Bracken also explained that “the person blows into the straw we put on the unit, and there is an open mouthpiece on the end of the straw”.

[13] Despite providing Mr. Paradis nine opportunities to blow, the machine did not beep to indicate it obtained a proper sample.

[14] Cst. Bracken explained that there were problems with Mr. Paradis putting his mouth on the mouthpiece and not blowing. She said you can hear when someone is blowing, and “the air he was providing was not going through, so a proper sample could not be obtained”. She provided a few mouthpieces, and at one point allowed him to blow into one before attaching it to the straw. After connecting it to the straw, his effort did not result in a suitable sample.

[15] Throughout, Cst. Bracken says she told Mr. Paradis that he was not providing a sample and he could be placed under arrest for refusal.

[16] On a thorough cross examination Mr. Paradis attempted to take Cst. Bracken through his nine efforts to blow based on notes he made with his wife who had listened from Mr. Paradis’ speaker phone in the police car. Cst. Bracken agreed his wife listened to their interaction and agreed that Mr. Paradis did not hesitate to blow when directed to do so.

[17] The first attempt did not work, and she told him to “make sure your tongue is not in the way”. He blew time after time and after the seventh attempt, she told him to blow harder. Asked if he said, “If I blow harder, I will pass out”, she could not recall, but did remember his denial of underlying health conditions.

[18] While she agreed it was possible Mr. Paradis told her he is a heavy smoker, she testified that they “have had people with emphysema provide acceptable samples”.

[19] Finally, asked on cross examination if he was complying with her requests to blow, she agreed he was, but in doing so was not providing a suitable sample. She explained that she gave him nine opportunities because sometimes people have trouble with the machine, and she thought nine times was fair.

[20] Mr. Paradis elected not to call evidence.

Position of the Parties:

[21] In closing submissions, the Crown fairly conceded he was not seeking a conviction on the impaired driving offence. Mr. Paradis’ effective cross examination disclosed the possibility the bike was weaving to avoid potholes.

[22] The Crown understood Cst. Bracken had testified that she was using an approved screening device, and submitted it was unnecessary for her to say so because she named the Alcosensor.

[23] Mr. Paradis' position is simply that he could not provide a suitable sample into the device because he is a heavy smoker; while the officer did not recall receiving this information, Mr. Paradis did not provide evidence in support of his contention.

[24] Mr. Paradis is not a lawyer and could not be expected to appreciate that a statement regarding a physical condition that resulted in or created an impediment, such as being heavy smoker, without any supporting evidence, is insufficient to meet the persuasive burden established in *R. v. Goleski*, 2015 SCC 6, pursuant to s. 794(2) CC- to establish an exception or excuse prescribed by law for failing to comply with a demand- "reasonable excuse".

[25] Having identified the real issue, I conclude after reviewing Cst. Bracken's testimony, she said there was an Alcosensor in her car that she obtained from the office. She did not refer to it as an approved screening device, an ASD, or by a name listed in the *Approved Screening Devices Order*, SI/85-200. It was referred to variously as the device and the Alcosensor.

Analysis:

[26] An approved screening device is defined in section 320.11 CC as "a device that is designed to ascertain the presence of alcohol in a person's blood and that is approved by the Attorney General of Canada under paragraph 320.39(a)."

[27] Paragraph 320.39(a) allows the Attorney General of Canada "to approve an instrument that is designed to receive and make an analysis of a sample of a person's breath to determine their blood alcohol concentration".

[28] Section 2 of the *Approved Screening Devices Order*, SI/85-200 reads as follows listing the approved devices:

> 2 For the purpose of the definition approved screening device in section 320.11 of the *Criminal Code*, the following devices, each being a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person, are approved:
>
> (a) Alcolmeter S-L2;
>
> (b) Alco-Sûr;
>
> (c) Alcotest® 7410 PA3;
>
> (d) Alcotest® 7410 GLC;
>
> (e) Alco-Sensor IV DWF;
>
> (f) Alco-Sensor IV PWF;
>
> (g) Intoxilyzer 400D;
>
> (h) Alco-Sensor FST;
>
> (i) Dräger Alcotest 6810;
>
> (j) Dräger Alcotest® 6820; and
>
> (k) Intoxilyzer 800.

[29] Several courts have considered the question whether the Crown must prove the legality of the device used in a failure case. While the cases relate to the predecessor legislation, I find they continue to have relevance.

[30] In *R. v. Weir*, 1989 CanLII 4927 (NL SC), Steele J. acting as a summary conviction appeal court, overturned a conviction where the Crown did not prove the device used by the officer was a model properly approved by the AG of Canada. The Court considered the different burdens applicable to outright refusal and "superficial and non-productive" efforts to blow into the device. The latter required proof of the device the former did not. The Court concluded at paragraph 25:

> "The moment the screening device is utilized, albeit in a halfhearted and apathetic manner, the integrity and legitimacy of the device is suspect. The police officer may have no lack of conviction that the endeavour was a pretense, but it is the operation of the device, to any extent, that impugns its reliability and challenges its legality. …It hardly matters that the accused's effort was not sincere as the damaging evidence is the failure to record a reading. It is that development which engenders skepticism over the correctness of the device used and the Crown, like it or not, is thereby confronted with the language of section 238(2): is the device "an approved screening device?"

[31] In *R. v. Lebrun*, 1999 CanLII 2086 (NS SC), Justice Haliburton, sitting as a summary conviction appeal court, concluded improper or incomplete identification of the device was insufficient proof it was an ASD. At trial, the officer testified he used an Alco-test 74010, not the "Alcotest 7410 PA3" listed in the Order.

[32] In *R. v. Dhillon*, 2006 ABQB 109, five unsuccessful efforts to blow and an incorrect identification of the unit as an Alcosensor IV resulted in acquittal. The trial judge concluded he could not assume it was one of the listed Alcosensors- Alco Sensor IV DWF, Alco Sensor IV PWF or Alco Sensor IV RBT IV.

[33] The QB appreciated the trial judge's adoption of the reasoning in *Lebrun*:

> [25] The trial judge in this case declined to accept the police officer's evidence that he used an "Alco Sensor IV" as sufficient proof that the device was an ASD. In doing so, it appears that the trial judge was guided by the circumstances in *R. v. LeBrun*. In that case, the Court refused to accept that the device used was an ASD. The police officer's evidence indicated that the device was an "Alco-Test 74010" when in fact the only similar ASD listed in the regulations was an "Alcotest 7410 PA3". In my opinion, it was not unreasonable for the trial judge to be persuaded by the similarities in the two cases.

[34] In reaching its conclusion the Court also signalled support for the analysis in *Weir, supra*, at para 25.

[35] Finally, in cases where there is evidence from an officer such as "I used an approved screening device", a court can conclude there is sufficient evidence supporting a finding the device was legitimate. (See: *R. v. Mortimer,* 2003 YKTC 36)

[36] Based on my review of the law, I discern the following principles:

1. There is an evidentiary distinction between refusal and failure cases.

2. When efforts have been made to blow into a device, legitimacy of the device becomes relevant and the Crown must establish the device is approved.

3. It may be enough to refer to the device as an approved screening device with nothing more.

[37] Mr. Paradis agreed to comply with the breath demand. Nine efforts to blow were unsuccessful in producing a sample. Cst. Bracken's evidence did not support use of an approved screening device.

[38] Alcosensor is a very broad name and not unlike the facts in *Lebrun*, *supra*, I note there are many Alcosensors listed in the Order- Alco-Sensor IV DWF, Alco-Sensor IV PWF, and Alco-Sensor FST. I cannot reach the conclusion that the device used was any of them.

[39] The Crown has not proven the case beyond a reasonable doubt. Mr. Paradis is not guilty of the charged offences.

Ronda van der Hoek, JPC