PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Turnbull*, 2014 NSPC 70

Date: 20140617
Docket: 2703314 and 2703315
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Ronald James Turnbull

Judge:	The Honourable Judge Timothy Gabriel, J.P.C.
Heard:	May 2 and June 17, 2014, in Dartmouth, Nova Scotia
Oral Decision:	June 17, 2014
Written Release:	September 9, 2014
Charges:	253(1)(a) and 253(1)(b) of the **Criminal Code**
Counsel:	Terri Lipton, for the Crown Craig Clarke, for the Defence

By the Court: (Orally)

Introduction:

[1] On Saturday, February 1st, 2014 at 1:11 a.m., Constable Nick Bryne, an officer of five years' experience with the Halifax Regional Municipal police department, was on patrol on Portland Street in Dartmouth, Nova Scotia. He received direction from dispatch to proceed to the vicinity of the Angus L. Macdonald Bridge to investigate a possibly impaired driver.

[2] Dispatch had been alerted by a civilian complainant who claimed to have observed a vehicle driving erratically on Woodlawn Avenue in Dartmouth. The vehicle was said to have been swerving, and to have made a U-turn. The civilian claimed to have followed the vehicle in question for a one to two kilometer stretch before discontinuing pursuit.

[3] By 1:25 a.m., Constable Bryne had reached Highway 118. He came across a vehicle matching the description and license plate that had been reported by the complainant. The car's turn signal was activated, and it was pulled over onto the shoulder of the road with the engine running, upon Bryne's arrival.

[4] The officer exited his cruiser and approached the vehicle. He noted that the driver's side window was open and that the accused, who was the sole occupant, was in the driver's seat. He could not detect an odour of alcohol.

[5] The accused was quite obviously using a cell phone. He advised Constable Byrne that he was trying to get back home to Stellarton, and had been using the GPS on his cell phone to try and find the way. He further said he had been over to Halifax and had had supper with his son earlier in the evening, and that during the meal he had consumed a glass of wine.

[6] Prior to the latter admission, Bryne had not noticed any indicia of impairment such as glossy eyes or, after the accused exited the vehicle, unsteadiness of gait. He candidly admitted that Mr. Turnbull's actions were smooth as he complied with a request for the provision of his license, insurance and vehicle registration documents.

[7] However, after being advised by the accused that he had consumed a glass of wine earlier in the evening, Constable Bryne testified that he formed a

reasonable suspicion that Mr. Turnbull had alcohol in his body. He asked the accused to blow in his face and detected a "sweetish smell". He then telephoned for an Approved Screening Device ("ASD"), returned to the accused's car, and made the ASD demand of him.

[8] The demand was in the standard form and was read by the officer from a provincially issued card. No issue as to the sufficiency of the wording of the demand has been raised by the accused. Mr. Turnbull registered a fail and was consequently given the breath demand. Again, no issue has been raised at trial as to the sufficiency or timing of that demand.

[9] When the breath test was administered by a qualified technician at the station, two results were obtained. The first, at 2:44 a.m., was 140 milligrams of alcohol in 100 millilitres of blood. The second reading, obtained at 3:02 a.m., was 130 milligrams of alcohol in 100 millilitres of blood. Mr. Turnbull consequently faces charges under s. 253(1)(a) and 253(1)(b) of the **Criminal Code**.

[10] The accused, who elected to call no evidence, takes the position that his s. 8 **Charter** right to be secure against unreasonable search and seizure was infringed by Constable Bryne, who could not have had reasonable grounds to suspect that he had alcohol in his body at the time he had operated his motor vehicle. Therefore, he further argues, there was no basis for the ASD demand, and as a consequence the results of that test, and those of the subsequent breath test that were administered at the police station, should be excluded under s. 24(2) of the **Charter.** The matter was heard by way of a blended *voir dire*.

Analysis:

[11] Section 253(1)(a) of the **Criminal Code** reads:

> 253. (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
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> (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
>
> (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

[12] The relevant provisions of s. 254(2) provide that:

> 254. (2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:
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> (a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
>
> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[13] The accused points out that he had advised the officer that he had consumed a glass of wine earlier in the evening with dinner, but not specifically when that consumption had occurred. Moreover, he stresses Constable Bryne's acknowledgement (on cross) that it is not unusual to see some drivers attempt to use their "smart phones" to find directions, particularly in situations where they are driving in an unfamiliar area.

[14] Indeed, Bryne acknowledged what he was told by Mr. Turnbull (involving the latter's use of a cell phone for directions) in explanation of the erratic driving. He further acknowledged that, at the point when he received this information from the accused, he had no basis upon which to make the ASD demand. Up to that time (as indicated previously) the officer had detected no smell of alcohol on the accused's breath, he had noted that Mr. Turnbull's speech was clear and his eyes were not noticeably watery, red or blood shot, and had observed that the accused's actions while retrieving his identification and insurance documents were fluid.

[15] However, when the accused admitted that he had consumed alcohol earlier in the evening, the picture changed for Constable Bryne. Counsel for the accused has summarized what he considers to be the effect of Constable Bryne's testimony (and the accused's position with respect to it) as such:

> [Bryne felt] that the admission of alcohol consumption by Turnbull was sufficient for him to subjectively believe that Turnbull had consumed alcohol. The accused takes issue with the sufficiency of this as a basis for an ASD. Put differently, the accused argues that Constable Bryne did not have reasonable grounds to suspect any alcohol or drug in his body when the demand was made.

[16] Defence counsel goes on to point out that if Bryne already felt that he had reasonable grounds to suspect that the accused had alcohol in his body, why subject Mr. Turnbull to the further requirement of blowing in his face? This would have been superfluous if Bryne had the necessary basis for reasonable suspicion contemplated by s. 254(2).

[17] The core of the accused's argument may be found on p. 3 of the Defence brief:

> When addressing the grounds upon which Constable Bryne based his demand, it is the defence's position that officer Bryne's ASD demand was based solely on Mr. Turnbull's admission that he had "one glass of wine" at dinner earlier in the evening. Constable Bryne indicated on direct examination that his demand was based on the driving complaint as well as the admission. However, Constable Bryne retreated significantly from this on cross-examination. As noted above on cross-examination, Constable Bryne admitted that he had been provided with what he agreed was a reasonable explanation for the driving complaint by Mr. Turnbull. The officer agreed that upon being provided with this reasonable explanation, he had no grounds for the ASD at that point.

[18] Certainly, there is case law (some of it conflicting) that deals with whether a bare indication of "some" alcohol consumed earlier in the day, earlier in the evening or over some other imprecise time frame, may provide (on its own) a sufficient basis upon which an officer may reasonably suspect that the individual in question, who had been operating a vehicle, has alcohol in his or her body.

[19] In *R. v. Ishmael*, 2012 ABCA 282, the Court was dealing with an accused who had been involved in a motor vehicle accident and called police. He admitted to the investigating officer that he had consumed some beer four and a half hours earlier. It was argued that this was the only evidence which the officer had available to him upon which to form a reasonable suspicion that the accused had alcohol in his body, and upon which to thereby base his ASD demand. The accused was initially acquitted. Upon appeal, the Summary Conviction Appeal Court opined as follows (and this is captured on page 6 of the subsequent Court of Appeal decision):

> 6 The Summary Conviction Appeal Judge summarized the law as follows:
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> In my view, the authorities have also established that an admission of alcohol consumption, at least in circumstances of the nature before the learned trial judge, is sufficient to support a reasonable suspicion of alcohol in someone's body without requiring investigation into timing, quantity, or behaviourial effects. That line of authority begins with *R. v. Gilroy*, and continues with *R. v. Dunn*, [2007] A.J. No. 664, *R. v. Chipchar*, *R. v. Rochette* and *R. v. Orcheski*, to name only some of the authorities. (citations omitted)

[20] The Summary Conviction Appeal Court reversed the trial judge and allowed the appeal resulting in a conviction. Upon further appeal by the accused, the Alberta Court of Appeal denied leave, and in the process stated at paras. 11 and 12 of *Ishmael, supra*:

> 11 Although the first question raises a question of law, it is not of sufficient public importance so as to justify an appeal to this court. The law on this issue is well settled. Starting with this court's decision in *R. v. Gilroy* (1987), 79 AR 318 (Alta CA), [1987] AJ No 822, an admission of consumption of alcohol is sufficient to meet the objective part of the test under s 254(2). It is unnecessary to analyze the behaviourial consequences. Numerous Court of Queen's Bench decisions have followed Gilroy and have found that other evidence about timing or amount of consumption need not be pursued to support this proposition: See *R. v. Thomas*, 2008 ABQB 610, 461 AR 216; *R. v. Orcheski*, 2011 ABQB 280, 517 AR 150; and *R. v. Chipchar*, 2009 ABQB 562, [2009] AJ No 1058.
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> 12 This line of cases confirms that the threshold of reasonable suspicion under s 254(2) is low. Police officers should not be required to enter into expert-type analyses regarding how much alcohol would be in a person's body based on the amounts and timing of the consumption. There are simply too many factors which can affect these conclusions including a person's height, weight, food consumption, size of drink, and alcohol concentration. Furthermore, entering into this type of questioning would only prolong and complicate the episode of detention and potential search imposed upon motorists.

[21] The Court did, however, leave open the question of whether, in an appropriate factual context, a bare admission of alcohol consumption might have occurred long enough in the past so as to render any "purported" reasonable suspicion based upon it, absurd in the circumstances.

[22] I have been referred to a number of other cases including *R. v. Gilroy*, [1987] A.J. No. 822 (Q.L.); *R. v. Mitchell*, 2013 MBCA 44*; R. v. Bhatti*, 2012 BCSC 741*; R. v. Adolf*, 2013 ABPC 334; *R. v. Boyd*, [2013] N.S.J. No. 42 (Q.L.).

As is frequently the case, none of these authorities is directly on point. It is strongly arguable (indeed the point is explicitly made in some of these authorities) that none of them involves a situation in which the officer had only a bare admission of consumption of some alcohol, at some imprecise time, and nothing else, with which to work.

[23] In *Mitchell, supra*, this observation is made with some force after an analysis of both of the lines of authority bearing upon this issue, the so called "Thomas Dunn line" based on *R. v. Dunn*, 2007 ABPC 160, and the "Hnetka line" based upon *R. v. Hnetka*, 2007 ABPC 197. These are Alberta authorities, both of which purport to rely upon the Alberta Court of Appeal decision in *Gilroy, supra*. Both lines take different views as to whether an admission analogous to the one which Mr. Turnbull made in this case could, on its own, found the reasonable suspicion contemplated by s. 254(2).

[24] In *R. v. Mitchell, supra*, Justice Monnin noted:

> 19 Under s. 254(2), an officer is required to have "reasonable grounds to suspect that a person has alcohol ... in their body" before making a demand for an ASD test. The principles governing the determination of "reasonable grounds" were recently dealt with by this court in *R. v. Jacob (J.A.)*, 2013 MBCA 29, albeit in the context of s. 254(3) and the standard of "reasonable grounds to believe." The following principles, which were explained in that case, apply equally to the determination of "reasonable grounds to suspect" in s. 254(2) (at para. 35):
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> > ....
> >
> > - there are two components to reasonable grounds – whether the police officer had a subjective belief, honestly held, that he had reasonable grounds to arrest or to demand a breath sample and whether a reasonable person in the position of the police officer would conclude that there were reasonable grounds for the arrest or the demand;
> >
> > - in weighing the evidence, the court should take into account the totality of the circumstances known to the police officer and should not examine and test each piece of evidence and each factor individually;
> >
> > - the question is not whether the facts, circumstances and inferences ultimately prove to be true, but whether it was reasonable for the police officer to believe, at the time, that the facts and circumstances were true, to draw the inferences that were drawn and to rely on them at the time of the arrest or the breathalyzer demand;
> >
> > ....

[25] Counsel for the accused has highlighted in bold (in his brief) the first portion of para. 35 of *Mitchell, supra*, where His Lordship states:

> 35 I am not prepared to go as far as saying that a simple admission of alcohol consumption by a driver is, in and of itself, sufficient to provide reasonable grounds on which to base an ASD demand, as each case must be considered on its own facts.
>
> …

[26] I would observe, however, that it is the latter portion of the paragraph which is particularly apposite. Therein, Monnin, J.A. notes :

> (35) … *From a common sense perspective, however, it would be rare, if ever, that there would be an admission of alcohol consumption with nothing else* – i.e., evidence as to why the vehicle was stopped, when (especially the time of the day and of the year) and where it was stopped, what was the driver's condition, how did he or she react to the police, what were the driver's exact words and how were they spoken, etc. These are all important factors to take into account. It is important to remember that it is the totality of the circumstances known to the officer, viewed together, that must be considered in determining whether there was a reasonable basis for his or her suspicion. Each indicia or piece of evidence is not to be examined in isolation. …
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> [Emphasis added]

[27] Indeed, the accused's argument herein is premised upon an assertion that the officer had nothing more than a bare admission of the consumption of a glass of wine earlier in the evening upon which to base his suspicion that Mr. Turnbull still had alcohol in his body at 1:25 a.m., when the encounter occurred. With respect, I disagree with this premise.

[28] The officer's evidence on direct was very clear. He was dispatched as a result of a complaint of erratic driving. The accused's vehicle was observed by the officer to be at the side of the road with the engine running. The vehicle matched the description afforded by the complainant and the licence plate matched also. The complaint had been of a vehicle swerving and making a U-turn. It was 1:25 a.m. in the early morning hours of Saturday, February 1st, 2014.

[29] I do not accept the accused's assertion that Constable Bryne's evidence on cross was a "retreat" from his evidence on direct in any respect. Moreover, he could not disassociate himself from the very information (received from dispatch) that had led him to the accused's vehicle in the first place. The reality is that

Constable Bryne was acting in response to a complaint that Mr. Turnbull's vehicle had been observed driving erratically (and dangerously), and this is what eventually led him to track down the accused.

[30] Constable Bryne admitted that it is not uncommon for a lost person to use a cell phone (as Turnbull stated he had been doing) as a GPS to help find his way. Sometimes this can explain such a manner of driving, even if it cannot excuse it. Moreover, the officer (correctly) acknowledged that, up to the point that he received this information from the accused, no indicia of alcohol consumption were apparent. At that moment, therefore, there was no basis for the ASD demand.

[31] But then the officer received the admission by the accused that he had ingested some alcohol (a glass of wine) earlier in the evening. How much earlier was not stated. How large the glass of wine had been was not stated. However, this was another fact that he could add (in his mind) to the reported observations of the complainant as to the erratic driving.

[32] One possible explanation for the totality of the circumstances with which Bryne was dealing at that moment was that the accused no longer had any alcohol in his body, and had driven erratically because his attention was divided while he used his cell phone.

[33] Another possible explanation was that Mr. Turnbull still had alcohol in his body while operating his vehicle, and that this may have contributed to the swerving (and U-turn) on the road.

[34] As Justice Shelley stated in *R. v. Chipchar*, 2009 ABQB 562:

> 20 … reasonable suspicion requires only that the belief be one of a number of possible conclusions based on the supporting facts, not a probability …

[35] The "reasonable grounds to suspect" standard articulated by s. 254(2) requires only that there is a possibility that an offence is being committed. Therefore (and respectfully), I am not required to go any further in this case than the Manitoba Court of Appeal did in *Mitchell, supra*. The totality of the circumstances and information available to Constable Bryne were enough to satisfy this rather modest standard.

[36] Finally, the request by Bryne that Mr. Turnbull blow in his face (after the former testified that he had already formed the requisite "reasonable suspicion") does not fly in the face of the above conclusion. Constable Bryne's object was not

merely to determine whether a basis existed for an ASD demand. His investigation also related to the possible impairment of the accused while he operated his vehicle (s. 253(1)(a)). Therefore, it was important for the officer to note all indicia of impairment (such as odour of alcohol on the accused's breath, and if so, its strength) including any that may have been overlooked up to that point.

[37] Even if I had come to a different conclusion on the basis of the above analysis, I would not have excluded the results of the ASD demand and/or the breath readings from evidence. I will explain.

[38] The three-pronged test set forth in the Supreme Court of Canada decision of *R. v. Grant*, 2009 SCC 32 requires that I consider:

> …(1) the seriousness of the **Charter** infringing state conduct, (2) the impact on the breach of the **Charter** protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits. …

[39] With respect to the first factor, I considered it to be very evident that Constable Bryne acted in good faith throughout. He believed that he had the requisite grounds to formulate a reasonable suspicion that Mr. Turnbull had alcohol in his body when the demand had been made. He had responded to a complaint with respect to erratic and hazardous driving. It was 1:25 a.m. in the early morning hours of Saturday, and he had the driver's admission as to the consumption of some alcohol earlier in the evening. He was a peace officer attempting to ensure that he was not allowing an impaired driver to continue blithely along his way, thereby endangering himself and others.

[40] He candidly admitted the he could not observe any of the usual indicia of impairment when he interacted with the accused. He nevertheless clearly believed he had the reasonable grounds to form the suspicion that he did. This was not a flagrant disregard or negligence on his part. Analysis of this factor would favour inclusion of the evidence.

[41] The second step in *Grant, supra* requires consideration of the impact of the breach on the **Charter** protected interests of the accused. Although this was a search, Mr. Turnbull was required to submit to what has been characterized as a "minimally intrusive test" (see for example Justice Hill in *R. v. Bryce*, [2009] O.J. No. 3640) and a "relatively non-intrusive test" (see the majority decision in *Grant, supra* at para. 111) and by a host of similar phrases.

[42] This consideration favours inclusion as well.

[43] With respect to the third stage of the *Grant* analysis (that is, society's interest in the adjudication of the case on its merits) I note that para. 79 of *Grant* directs me to consider this issue from the vantage of whether the truth seeking function of the criminal trial process would be better served by the admission of this evidence or by its exclusion. As the Crown points out in its brief, the results garnered by breathalyzer tests are highly reliable. No issues were raised concerning the functioning of the device itself. I, therefore, cannot disagree with the statement at para. 10 of the Crown's brief:

> The evidence is clearly relevant and it is dispositive of the issue of guilt or innocence. It is submitted that the exclusion of these results would undercut the truth seeking function of the Court. Such exclusion would fly in the face of society's abhorrence of impaired driving.

[44] This factor also favours inclusion.

[45] Weighing all the factors aforementioned from *Grant, supra*, I would have concluded (if it had been necessary to do so) that exclusion of this evidence would bring the administration of justice into disrepute.

Disposition:

[46] Therefore, I find Mr. Turnbull guilty of the charge under s. 253(1)(b) of the **Criminal** Code; namely, that of having the care and control of a motor vehicle while his blood alcohol level exceeded .08. As for the s. 253(1)(a) charge, given Constable Bryne's candid testimony, I was left in reasonable doubt as to whether Mr. Turnbull was actually impaired while he operated his motor vehicle, and I accordingly acquit him of this charge.

Timothy Gabriel, J.P.C.