PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Skinner*, 2014 NSPC 74

Date: 20140923
Docket: 2430819
Registry: Amherst

Between:

Her Majesty the Queen

v.

Paul Bryan Skinner

DECISION

Judge: The Honourable Judge Paul B. Scovil

Heard: May 21, 2014, in Amherst, Nova Scotia

Decision: September 23, 2014

Charge That he, on or about the 3rd day of March, 2012, at or near Lower Wentworth, Nova Scotia, did without reasonable excuse, refuse to comply with a demand made to him by Constable Jonathan Heycock, a peace officer, under subsection 254(2) of the Criminal Code to provide forthwith a sample of his breath as in the opinion of Constable Jonathan Heycock was necessary to enable a proper analysis of his breath to be made by means of an approved screening device contrary to section 254(5) of the Criminal Code.

Counsel: Bruce Baxter, for the Crown
Robert Hagell, for the Defendant

By the Court:

INTRODUCTION

[1] Mr. Paul Skinner was stopped by Constable Jonathan Heycock on March 3, 2012. Constable Heycock encountered Mr. Skinner while driving on Highway 4 in the Wentworth area of Cumberland County, Nova Scotia. He queried Mr. Skinner's licence plate through a computer databank as he originally could not see the sticker normally attached to the licence plate showing a valid registration. The registration came back through his computer system as being expired and at that point, Constable Heycock activated his emergency equipment and pulled the Accused over, parking directly behind the vehicle of Mr. Skinner. Constable Heycock was then able to observe a valid sticker on the licence plate. He went to Mr. Skinner's driver's side window simply to tell him that there had been a computer error and that he would be free to go. At the driver's side window, Constable Heycock could smell alcohol coming from Mr. Skinner's breath. As a consequence of smelling alcohol on Mr. Skinner's breath, Constable Heycock made a roadside screening demand pursuant to Section 254 of the **Criminal Code**. The demand for a sample of Mr. Skinner's breath by the Constable set off a somewhat lengthy odyssey which brings us to this Court making a decision as to what constitutes a refusal under section 254(5) of the **Criminal Code**.

FACTS

[2] The Crown called Constable Jonathan Heycock who was with the Royal Canadian Mounted Police detached to the Oxford office in Cumberland County, Nova Scotia. On March 3, 2012 while on general duties, he was patrolling the area in his marked police cruiser. He was located on Highway 4 in the Wentworth area of Cumberland County when he noticed a vehicle with a licence plate that did not appear to have a proper sticker attached to it indicating that it had a valid registration. Constable Heycock queried through his computer system the registration for the licence which came back as being expired. As a consequence of this, Constable Heycock activated his emergency equipment on his police vehicle and stopped the Accused. As the Constable pulled in behind the Accused's vehicle, he noted that there was in fact a valid registration sticker. The officer then approached the driver of the vehicle. The officer spoke to the driver of the vehicle

and smelled alcohol coming from the breath of the individual later identified as Mr. Skinner. Constable Heycock testified that he then asked Mr. Skinner if he had been drinking and brought him back to his police vehicle. Constable Heycock obtained a roadside screening device from the vehicle and read a roadside screening demand to Mr. Skinner from a card. At that point, Mr. Skinner began arguing with the officer that he should not have been stopped in the first place. Constable Heycock testified that he explained the consequence of a refusal to his demand, to which Mr. Skinner continued to argue with him. At that point, Constable Heycock turned on audio equipment that was in the vehicle and recorded the rest of the long and tortured conversation that took place between he and Mr. Skinner. The audio recording was transcribed and entered as Exhibit Two in this trial. It shows that after a lengthy period of Mr. Skinner arguing with the officer about providing a sample, a second officer, Corporal Darren Galley, attended. The audio continued to record the ongoing dialogue between Mr. Skinner and the officers.

[3] Corporal Darren Galley of the RCMP testified that on the night in question, he was the supervisor of the Amherst Traffic Services for the RCMP. Constable Heycock had requested assistance to which he responded. When he arrived, Constable Heycock had an individual later identified as Mr. Skinner in the back of the police cruiser. Corporal Galley had interactions with both Constable Heycock and Mr. Skinner, all of which were recorded by Constable Heycock's audio device in which are reproduced in Exhibit Two.

[4] The Accused is charged under Section 254(5) of the **Criminal Code**. Section 254(2)(b) states:

> 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 and control of the 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… (b), in the case of alcohol:
>
> …
>
> (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.

ISSUES

[5] Mr. Skinner raises the following issues:

- The demands for breath sample are not clear and unequivocal in all the circumstances.
- The second and third roadside breath demands fall outside the requirement that such demands be made forthwith.
- There was no unequivocal refusal by Mr. Skinner to take the test in all the circumstances.
- The Crown failed to establish that Mr. Skinner was the operator of a motor vehicle.
- The detention of Mr. Skinner was in violation of the **Charter of Rights and Freedoms**.

LAW

Lack of an Unequivocal Demand

[6] Constable Heycock indicated that upon Mr. Skinner rolling down his driver's side window he could smell alcohol emanating from Mr. Skinner. Constable Heycock asked Mr. Skinner if he had been drinking and then immediately advised him that he would be required to comply with a roadside screening demand. He brought Mr. Skinner back to the police vehicle where the officer read a roadside screening demand from a card. The officer said:

> "I demand that you forthwith provide me with a sample of your breath suitable for analysis by an approved screening device and to accompany me to my police car for the purposes of obtaining a sample of your breath. Should you refuse this demand, you will be charged with the offence of refusal".

[7] I find that those words were clear and unequivocal. There was no evidence before me to show that the Accused did not understand what the officer was saying. The Accused went to some great lengths in speaking to the officer. He then indicated he did not understand why he would be given a demand, but there was nothing to show that he didn't understand the words as they were spoken.

Was the Demand Made Forthwith?

[8] The second issue raised by Mr. Skinner is that the demand made by the officer was not made forthwith. Constable Heycock testified that he had stopped the Accused around 7:00 p.m. on the evening in question and that his demand was made at 7:09 p.m. There can be no question that this demand was in all the circumstances made on a forthwith basis as envisaged by the **Criminal Code**. Mr. Skinner cited **R. v. Woods** (2005) 197 C.C.C. (3d) 353 (S.C.C.). **Woods** is distinguishable from the case before me. In **Woods,** the accused refused a roadside demand at roadside, was arrested and transported back to the police detachment. The accused was again the subject of a RSD an hour later at the detachment, which he again refused. Subsequent to speaking to a lawyer, Woods then gave a breath sample. The sample was found in that case to have been given in response to the second demand.

[9] I find here that the demand made by Constable Heycock was in fact made forthwith and that there was a continuing and operating demand throughout the interaction between Constable Heycock and Mr. Skinner.

[10] The term "forthwith" in section 254(2)(b) is a two way street. Not only must the officer make an RSD demand forthwith, but compliance by an individual at roadside must occur forthwith. Undue delay and noncompliance by an accused where there is no evidence of any intention to comply with an officer's demand cannot then operate to afford a defence by saying "but I never said no". The Court must look to the totality of the circumstances to determine if in fact there was a refusal. The officer was able to capture some 60 pages of conversation showing nothing but delay on the part of the Accused culminating with the Accused calling the officers "arseholes". The evidence in its entirety shows the Accused was refusing to comply with the demand.

Proof of Operation of a "Motor Vehicle"

[11] Mr. Skinner further argues that the Crown failed to prove two essential elements in this matter. First, that it was not proven that the Accused drove a "motor vehicle"; and secondly, that the Crown failed to prove that the Accused was the driver.

[12] It is greatly preferable that the Crown, in trials where operation of a motor vehicle is an essential element of the offence, attempt to obtain from the

investigator the words “motor vehicle” to describe what an accused was driving. I know it can be frustrating when a Crown asks a police officer what type of a vehicle was being operated and gets a blank look from the police witness accompanied by descriptions like “brown”, “Chev” or “pickup”. In those cases, even a question like “How was the vehicle propelled?” can sometimes fail to trigger a helpful response. But the question remains: What has to be before a Court to prove the vehicle in question was a “motor vehicle”?

[13] In **R. v. Aversa** [2007] ONCJ 644 Justice Brewer of the Ontario Court of Justice stated the following:

> 11 There is no question that "car" is a commonly used synonym for motor vehicle: see, for example, WordNet 2.0 8 2003 by Princeton University on Infoplease, 8 2000B2007 Pearson Education, http://www.infoplease.com/thesaurus; Roget's International Thesaurus, 1922. Indeed, the two words are often used interchangeably in the jurisprudence on drinking and driving offences: see R. v. McKerness, [2007] O.J. No. 2411 (C.A.); R. v. Pelletier, [2000] O.J. No. 848 (C.A.); R. v. Lilieveld, [2002] O.J. No. 4661 (C.A.). Dictionary definitions of "car" give as its primary meaning "a four-wheeled motor vehicle, usually propelled by an internal combustion engine": see American Heritage Dictionary of English Language, 4th edition 2000; Webster's Online Dictionary, http://www.websters-online-dictionary.org; Word Web Online Dictionary, www.wordwebonline.com; Logos Dictionary, http://www.logosdictionary.org.
>
> 12 After taking judicial notice of the dictionary definition of "car", and considering it together with the evidence of the officers, I am satisfied beyond a reasonable doubt that the car driven by the defendant falls within the definition of "motor vehicle" in the Criminal Code. The location of the car on the roadway, the distance it traveled and the speed at which it was operated demonstrate that the vehicle was not propelled by muscular power and that it was not a streetcar or railway car.

(See also **R. v. Taylor** [2014] O.J. No. 2948 and **R. v. Arsenault** [2010] NBPC 16)

[14] In this matter, the officer testified that he came upon a “vehicle” and entered the “vehicle licence” as part of a query on an electronic database. He referred to his marked police car as his “vehicle” and that he had the “vehicle” towed. At page 12 of the transcribed conversation between the Accused and Constable Heycock, he advised the Accused that at some point he could get in his car and drive home.

He further referred to the Accused's vehicle as a car at pages 28, 37, 40, 57 and 67 of the transcript.

[15] After examining the entire evidence, am I left in any doubt that the Accused was operating a motor vehicle? Not in the least. Mr. Skinner also argued that the Crown failed to prove the Accused was the driver. The officer's evidence again indicated that he approached the driver. He then asked the driver if he had been drinking, which then resulted in taped conversation with the Accused. I am left in no doubt that the Accused was indeed the driver of the vehicle in question.

Unlawful Detention

The remaining issue to be considered is whether the detention of Mr. Skinner by Constable Heycock was in violation of Mr. Skinner's rights under the **Charter of Rights and Freedoms**.

[16] Mr. Skinner's Pre-trial **Charter** notice was simply asking for an order pursuant to Sections 7, 8 and 9 of the **Charter** dismissing the charge against him. The notice filed was devoid of any particulars. Similarly, written arguments filed by Mr. Skinner did not make any analysis of the **Charter** violations complained of, but simply cited one Supreme Court of Canada case.

[17] Sections 7, 8 and 9 of the **Charter of Rights and Freedoms** states as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

[18] Mr. Skinner puts forward the case of **R. v. Harrison** [2009] S.C.J. No. 34 to establish that the officer in this matter ought to have had no interaction with Mr. Skinner once he had established that the licence plate of the Accused's vehicle was not in fact expired. Essentially he argues that Constable Heycock should have

simply not gotten out of his vehicle and drove away with no explanation at all to Mr. Skinner as to what had taken place.

[19] In **Harrison**, the officer involved noted the accused and a friend in a rental vehicle on the highway in Ontario. The rental vehicle was from British Columbia and there were no front licence plate as was required. In Ontario, a front licence plate is mandatory. The officer activated his roof lights and pulled the accused over and in doing so noted that that the vehicle's province of registration was British Columbia, where no front licence plate was required. The officer in that case testified that he felt abandoning the detention would affect the integrity of the police in the eyes of observers and therefore proceeded to stop and speak to Mr. Harrison asking for his licence and registration. At that point, Harrison was unable to provide a licence saying he left it in Vancouver. The officer proceeded to search the vehicle turning up contraband.

[20] The facts in **Harrison** are distinguishable from those before this Court. In **Harrison**, the officer having determined that nothing was illegal, continued on an investigation by requesting documentation from the driver of the vehicle. Here the officer simply was telling the driver that he was free to go. Once Constable Heycock smelled alcohol emanating from the breath of the Accused, he was duty bound to take the measures he did. He did not operate on a "hunch" nor were his actions similar to those in **Harrison** where the trial judge determined that the officer's intention throughout the encounter "was take whatever steps were necessary to determine whether his suspicions were correct" notwithstanding that there was a lack of any legal basis for a stop. Again in **Harrison**, the trial judge described the officer's actions as "brazen and flagrant" and further found that the officer's in court explanations for stopping the vehicle were "contrived and defy credibility". I do not find that to be the case here. Here, the officer operated on a computer readout indicating that the registration was expired. When he was able to observe a valid registration sticker, he was simply going to tell the Accused to go on his way. There is no indication that the officer had any further investigations in mind, nor was he going to search the vehicle of the Accused. I find that the detentions in this case of the Accused were not arbitrary and did not violate the Accused's **Charter Rights**.

[21] In conclusion, I find that the Accused willfully refused to provide a sample of his breath for the purposes of the roadside screening as required pursuant to the legislation under the **Criminal Code**. Accordingly, I find him guilty.

Paul B. Scovil, JPC.