IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Wentzell, 2006 NSPC 47

Date: 20061019
Docket: 1583362 & 1583363
Registry: Bridgewater

Between:

R.

v.

Robert Jeffery Wentzell

Judge: The Honourable Judge Anne E. Crawford

Heard: July 20, 2006 in Bridgewater, Nova Scotia

Charge: 253 (a) of the Criminal Code of Canada
254 (5) of the Criminal Code of Canada

Counsel: Paul Scovil, for the Crown
Donald Murray, for the defence

By the Court:

[1] Robert Jeffery Wentzell, aged 77, is charged as follows:

> on or about the 14th day of September, 2005 at or near Mahone Bay, Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle to wit a 1997 Chevrolet pickup truck contrary to Section 253 (a) of the Criminal Code of Canada.
>
> AND FURTHER
>
> Did without reasonable excuse refuse to comply with a demand made to him by Constable David Greene, a peace officer to provide then or as soon thereafter as was practicable samples of his breath as in the opinion of a qualified technician were necessary to enable proper analysis to be made in order to determin the concentration, if any, of alcohol in his blood contrary to Section 254(5) of the Criminal Code of Canada.

Facts

[2] On the evening of September 14, 2005 Cst. Gill, a young member of the R.C.M.P. with one year's experience, was on patrol in his police vehicle in Mahone Bay, Nova Scotia. At 10:43 p.m. as he turned off Main Street onto Claremont Street, he saw a white pickup truck make a wide turn onto Main Street. The driver did not signal the turn, but did flick the highbeams on and off quickly. Cst. Gill followed the vehicle when it turned onto Edgewater Street where it crossed the double solid line twice and veered once to the right side of the road.

[3] Cst. Gill pulled the vehicle over. Before the officer got out of his police vehicle, the defendant emerged from the driver's side of the truck and came toward him. Cst. Gill got out and asked him to get back into his own vehicle. The officer noted that he was staggering as he complied.

[4] Cst. Gill went to the driver's side of the truck and asked the defendant for his papers. He noted that the defendant was elderly, that his speech was slurred, that his eyes were bloodshot and that he had a smell of alcohol on his breath. Cst. Gill therefore suspected that the defendant had alcohol in his body, but as he had no approved screening device with him and was not trained to use one, at 10:47 p.m. he called the closest member on duty, Cst. David A. Greene, to attend for the purpose of

demanding and administering the approved screening device test, informing him of the grounds for his suspicion.

[5] Throughout this encounter, the defendant appeared upset and agitated and kept asking, “Why did you stop me; you have no right to stop me.” Cst. Gill did not reply to these questions or otherwise explain the stop. He neither mentioned the driving irregularities he had noticed nor did he ask or tell the defendant to wait.

[6] Cst Greene arrived at 11:00 p.m. and read the approved screening device demand; the defendant agreed to provide a sample of his breath and 11:07 p.m. the device registered a “fail”. Cst Greene then read the breathalyzer demand and asked if the defendant understood it. The defendant replied “Yes.”

[7] At 11:10 p.m. Cst Greene placed him under arrest and read the police warning. The defendant indicated that he understood the warning. At 11:12 p.m. Cst Greene read the defendant his right to counsel and the defendant stated, “I understand that. I think I will call a lawyer.” He was also informed of his right to apply for legal aid and he indicated that he understood that.

[8] At 11:17 p.m. Cst Greene turned the defendant back over to Cst. Gill for transportation to Bridgewater detachment, the closest detachment where there was a breathalyzer technician on duty. Cst. Gill left the scene with the defendant at 11:24 p.m. and arrived at Bridgewater detachment at 11:33 p.m. with no stops en route.

[9] At the detachment the defendant and Cst Gill were met by Cst McKenna, the breathalyzer technician, who asked if the defendant wanted to speak to a lawyer. The defendant indicated that he did and Cst. Gill contacted a lawyer for him and left him alone to speak with the lawyer, which he did from 11:42 p.m. to 11:50 p.m. when the defendant was brought into the breathalyzer room.

[10] After the 15 minute waiting period to ensure that there was no alcohol in the defendant’s mouth, the intake tube was presented to him. He then told Cst. McKenna that he did not want to provide a sample. Cst. McKenna told him that if he refused he would be charged with the offence of refusal. The defendant replied, “I understand.”

[11] Cst. McKenna turned him back over to Cst. Gill and the charges before the court ensued.

[12] Cst. McKenna testified that during the 15 minute waiting period he had an opportunity to closely observe the defendant. He said that his eyes were red and watery; his speech was slow; he was unsteady on his feet and had an odour of alcohol on his breath. He was very verbose and had rapid mood swings. Cst. McKenna testified that there was no question in his mind but that the defendant's ability to operate a motor vehicle was impaired by alcohol.

Issues

[13] The defence raises the following issues:

> 1. Did the detention at the roadside breach the defendant's rights under s. 10(a) or (b) of the *Charter*?
>
> 2.Was the breathalyzer demand valid?
>
> 3. Has the Crown established sufficient evidence of impairment to prove the charge under s. 253 (a)?

Roadside detention

[14] The Crown conceded that the defendant was detained from 10:43 p.m., when he was stopped by Cst. Gill, until 11:00 p.m., when Cst. Greene read him the approved screening device demand, without being informed either of the reason for his detention or of his right to counsel.

[15] I recently considered the issue of detention in the context of an approved screening device demand in *R.v. Simmons*, [2006] N.S.J. No. 362. After considering *R. v. Grant* (1991), 67 C.C.C. (3d) 268 (S.C.C.), *R. v. Cote* (1992), 70 C.C.C. (3d) 280 (O.C.A.), *R. v. Debaie* (2000), 187 N.S.R. (2d) 188 (P.C.), and *R. v. Woods*, 2005 SCC 42, [2005] 2 S.C.R. 205, I concluded that, in the unusual circumstances of that case, a delay of thirty-three to thirty-five minutes in making the demand was justified and that, despite the delay, the demand was a proper one. The reasons for so finding included that the police officers were preoccupied with dealing with a serious threat to public safety created by the defendant; and that the defendant had already been given his *Charter* rights in regard to other more serious offences, on which he was being held anyway.

[16] *R. v. Woods*, *supra,* was cited in *R.v. Anderson*, 2006 CarswellSask 103, to which I was referred by defence counsel in the present case. In the *Anderson* case the defendant was charged with refusing the ASD demand, which was not given until a second officer arrived on the scene with a device within minutes of being called by the first officer who was not qualified to administer the device. The demand was held not to be valid for three reasons:

> 1. Detention "for an ASD test" without a demand is not an option under s. 254(2).
>
> 2. The defendant was not advised of her right to counsel upon detention;
>
> 3. The demand was not made "immediately" as required in *Woods*, *supra*.

[17] In *Anderson*, it appears that the defendant was at least told why she was being detained: "for an approved screening device demand." Here, the defendant was told nothing – not even that he was being detained; yet the detaining officer was clear on cross-examination that once he suspected that the defendant had alcohol in his body and had called Cst. Greene, the defendant was not free to leave.

[18] In the present case there were no unusual circumstances, other than Cst. Gill's lack of training in the approved screening device, yet the defendant was detained for seventeen minutes with no explanation. I find that this breach of his right under s. 10(a) of the *Charter* to be informed promptly of the reason for his detention cannot be justified, either under s. 1 of the *Charter* or by the later demand under s. 254(2) of the *Criminal Code.* As Gibson, A.C.J.P.C. stated in *R. v. Debaie*, *supra*,:

> ¶ 22 I recognize in this case that Constable Thorne delayed making the s. 254(2) demand until the screening device arrived. I conclude that the police cannot stop time from running re: the "forthwith" requirement simply by delaying the demand. The case of *R. v. Demers* [1997] O.J. No. 4860 (Ont. Prov. Div.) addresses this issue. It took 20 minutes in the *R. v. Demers* case for the device to arrive. The Court held in that case that the officer's attempt to delay the "start" time by delaying the s. 254(2) demand until the screening device arrived at the location of the detention and his failure to advise the accused of his s. 10 Charter rights resulted in a breach of the "promptly" requirement in s. 10(a) of the Charter and a failure to meet the "provide forthwith" requirements in s. 254(2) of the Criminal Code.

[19] The remedy under *Charter* s. 24(2), exclusion of the evidence obtained subsequent to the breach, is appropriate and will be granted.

Validity of Breath Demand

[20] The exclusion of the results of the ASD test deprives the Crown of the evidence necessary to establish reasonable and probable grounds for the breath demand under *Criminal Code* s. 254(3). See *R. v. Woods, supra*. The Crown therefore cannot establish that the demand was a proper one, and the defendant cannot be convicted for refusing an improper demand.

Evidence of Impairment

[21] The test for impairment is proof beyond reasonable doubt of any degree of impairment from slight to great. *R. v. Stellato*, [1994] 2 S.C.R. 478. In deciding whether the Crown has established beyond reasonable doubt that the defendant was impaired by alcohol in his ability to drive, I can consider only the evidence obtained by Cst. Gill before the breach of the defendant's *Charter* rights by the unjustified detention.

[22] That evidence was:

1. A sloppy wide turn without signal
2. Flicking the high beams on and off quickly
3. Wandering over the centre line twice
4. Wandering to the shoulder once
5. Staggering
6. Slurred speech
7. Bloodshot eyes
8. Smell of alcohol on the breath.

[23] Against that evidence I must set:

1. The age of the defendant

2. The possibility of mere careless driving

3. The fact that the foregoing led the police officer merely to suspect alcohol in the defendant's body, rather than to decide he had reasonable and probable grounds to make a breath demand.

[24] Given the foregoing, I cannot be satisfied beyond reasonable doubt that the indicia noticed by the officer point necessarily to any degree of impairment in the ability to drive. These indicia may equally be explained as the sloppy driving of an older man who had had something alcoholic to drink, but not enough to impair his ability to drive.

Conclusion

[25] I conclude that the Crown has not succeeded in proving either charge beyond a reasonable doubt, and acquittals will be entered on both counts.