

IN THE PROVINCIAL COURT OF NOVA SCOTIA

**Citation:** R. v. Robar, 2004 NSPC 27

**Date:** 20040506

**Docket:** 1344272

**Registry:** Bridgewater

**Between:**

R.

v.

Peter Eugene Robar

**Judge:** The Honourable Judge Anne E. Crawford

**Heard:** May 4, 2004, Bridgewater, Nova Scotia

**Counsel:** Paul Scovill, Crown Attorney  
Mark Dempsey, Defence Attorney

**By the Court:**

[1] Peter Robar is charged with driving with a blood alcohol level over the legal limit contrary to s. 253 (b) of the *Criminal Code*.

**Facts**

[2] The defendant was stopped at a checkpoint which Bridgewater Town Police were operating on North Street within the Town of Bridgewater, Nova Scotia on June 29, 2003.

[3] There is no issue as to the validity of the demand which was made at 2340 hours.

[4] Before Cst. Foster could read the defendant his *Charter* rights Cst. Mader, the only other police officer with a vehicle at the checkpoint left to pursue and stop another motor vehicle which had attempted to evade the checkpoint. Cst. Foster interrupted his dealing with the defendant, who remained in the backseat of his police car, to stand by and then attend with Cst. Mader at the other car until he was sure that Cst. Mader was all right on his own.

[5] He then left immediately to transport the defendant back to the police station where they arrived at 2359.

[6] In the police station Cst. Foster read the defendant his Charter rights and asked if he wanted to speak to a lawyer. The defendant thought for a moment or two and then said, "Mark Dempsey is my lawyer." Cst. Foster knew Mr. Dempsey practiced in Bridgewater and believed he lived in the local area, although he did not know for sure.

[7] The defendant was taken to an interview room, where there was a telephone and a telephone directory and Cst. Foster tried to contact Mr. Dempsey, but found no home listing for him in the Bridgewater telephone directory.

[8] At 0008 hours Cst. Foster called Mr. Dempsey's office number and got an answering machine. He did not leave a message and was not sure if he was even given the option to do so.

[9] He then called dispatch to see if they could get Mr. Dempsey's home phone number for him through the police computer system. They give him a 543 (Bridgewater) number, which he dialled at 0011 hours and discovered that it was a wrong number. He also called Directory Assistance (411), but was told that they also had no home listing for Mr. Dempsey in Bridgewater.

[10] The defendant was present while all this was being done.

[11] Cst. Foster then asked the defendant if he wanted to call duty counsel or another lawyer, and the defendant replied, "No; I'll take the test; I just hope I'm not over."

[12] At 0012 or 0013 hours he was turned over to the breathalyzer technician and at 0020 hours the first test was performed.

[13] The Certificate of Qualified Technician shows that readings of 120 were obtained at 0020 hours and at 0040 hours.

## **Issues**

[14] The defence called no evidence but raises the following issues on the evidence adduced by the Crown:

(1) The 19 minute delay between the reading of the demand and the reading of the Charter rights as constituting a breach of the defendant's right under s. 10(b) of the *Charter* to be informed of his right to counsel;

(2) The same delay meaning that the breath samples were not taken "as soon as practicable" within the meaning of s. 254(3) and/or s. 258(1)(c)(ii) and therefore precluding the Crown from relying on the presumption of identity under the latter subsection;

(3) breach of the defendant's right to counsel by failing to hold off on the breathalyzer tests to give the defendant further opportunity to consult with counsel of his choice.

## **Delay in reading Charter rights**

[15] Although this may have been a technical breach of the right to counsel, it had no consequences, as the defendant was not questioned or asked to submit to any

procedures until he was properly Chartered at the police station. Such a technical breach does not require any remedy under *Charter* s. 24 (2).

### **“As soon as practicable”**

[16] I find that the delay of 19 minutes is satisfactorily explained. Cases make it clear that “as soon as practicable” is not to be equated with no delay whatever. Here, the officer felt he had a duty to assist another officer in a situation where there might have been danger to the second officer. I am not prepared to second guess him as to what other alternatives, if any, he might have had. He did what he believed he had to do in that exigency, and what he did was not unreasonable. The tests were, in my opinion, taken as soon as practicable and the Crown is entitled to the presumption of identity.

### **Right to counsel**

[17] *R. v. Prosper* [1994] 3 S.C.R. 236 sets out the duty on the police in regard to facilitating a detainee’s right to counsel:

¶ 49 Section 10(b) of the Charter does not impose a substantive constitutional obligation on governments to ensure that duty counsel is available, or likewise, provide detainees with a guaranteed right to free and immediate preliminary legal advice upon request. However, in jurisdictions where a duty counsel service does exist but is unavailable at the precise time of detention, s. 10(b) does impose an obligation on state authorities to hold off from eliciting evidence from a detainee, provided that the detainee asserts his or her right to counsel and is reasonably diligent in exercising it. **In other words, the police must provide the detainee with what, in the circumstances, is a reasonable opportunity to contact duty counsel.** While this holding-off requirement does not apply in cases of urgency, the evidentiary presumption under s. 258(1)(d) of the Code, which provides that readings taken within two hours of an alleged offence are proof of the blood alcohol level at the time of the offence, is not a sufficiently "urgent" factor to override a detainee's right to counsel under s. 10(b).

¶ 50 **In addition, once a detainee asserts his or her right to counsel and is duly diligent in exercising it, thereby triggering the obligation on the police to hold off, the standard required to constitute effective waiver of this right will be high.** Upon the detainee doing something which suggests he or she has changed his or her mind and no longer wishes to speak to a lawyer, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their

obligation during this time not to elicit incriminating evidence from the detainee.  
[Emphasis added]

[18] In this case, the police officer himself called the defendant's stated counsel of choice at the only available number and, not surprisingly at midnight on a Saturday, got only an answering machine at counsel's office. He then took steps to find a home phone number for counsel. He knew that this lawyer had an office in Bridgewater and when he got a wrong local number for him, he called 411 for another local number. When that did not work he offered to call another lawyer or duty counsel for the defendant.

[19] The defence submits that he should have gone further and provided telephone books to the defendant so that he could attempt to contact his counsel of choice on his own and/or inform the defendant of the police duty to hold off while he attempted to contact counsel.

[20] It is important to note that *Prosper* speaks to the situation where duty counsel is not available; and, even then, it is clear that the defendant has a correlative duty to act diligently in his attempts to contact counsel.

[21] Here it is not clear what more the defendant could have done to locate Mr. Dempsey than the police had already done. It does not make sense to require either that the police or the defendant look through every phone book in the province or ask directory assistance to do so in order to contact local counsel who might or might not live in some other unknown location.

[22] I find that the police officer acted reasonably in concluding that the defendant's first counsel of choice was not available and in asking him if he wanted to contact another lawyer or duty counsel.

[23] The defendant declined that opportunity and decided to take the test, even in the face of several offers from the police to try to contact whomever else he wished. I find that the defendant clearly waived his right to counsel and that there was no requirement that the police hold off further on the test.

## **Conclusion**

[24] The Crown having established all elements of the offence and there being no reason under the *Charter* to exclude any of the Crown evidence, I find that the defendant is guilty as charged.