**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation: R. v. Charles Frances Rudolph, 2004 NSPC 35**

**Date:** 20040416
**Case No.(s):** 1274564
1274565
**Registry:** Halifax

**Between:**

**R.**

**v.**

**Charles Frances Rudolph**

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| **Judge:** | The Honourable Judge C. H. F. Williams, JPC |
| **Heard:** | Decision rendered orally on April 16, 2004 in Halifax, Nova Scotia |
| **Counsel:** | Glen A. Scheuer for the Crown<br>Michael S. Taylor for the Defence |

## By the Court

### Introduction

**[1]** It was 0130 hours on January 31, 2003. Sgt. Ken Burton, of the Regional Police Force, in his role as shift supervisor, was on routine patrol within the Halifax Regional Municipality when he observed a pickup truck that was travelling in front of him on the highway, swerved suddenly into the middle lane. This caused the driver of another vehicle, travelling in the same direction, to apply her brakes to avoid a collision. Further, he saw the truck accelerate from a red light stop to 100 kilometres an hour in a 50kph zone for a distance of five hundred metres before he commanded it, at 0133 hours, to pull over.

**[2]** The officer noted that the truck's windows were rolled down; the operator, who was the accused, Charles Frances Rudolph, had lit a cigarette and had commenced to smoke it; fumbled when he was attempting to obtain his papers from his wallet; had bloodshot eyes and slurred his speech. When the accused exited his vehicle and walked to the police cruiser, although he was steady on his feet he swayed somewhat and exuded a smell of alcohol. From these perceived indicia of impairment, his observations of the accused driving and his experience as a qualified Breathalyzer technician, the officer was of the opinion that the accused ability to operate a motor vehicle was impaired by alcohol or drug.

**[3]** Consequently, Sgt. Burton arrested the accused for impaired driving, Chartered and cautioned him, all of which the accused understood and acknowledged. Subsequently, Sgt. Burton turned over the accused to Constable Beeler, another Breathalyzer technician, who ultimately administered the required tests and received breath samples at 0227 hours and 0245 hours. The accused failed the tests.

### Issue

**[4]** In the circumstances of this case, the accused contended that the police breached his constitutional rights guaranteed under s. 8 of the ***Canadian Charter of Rights and Freedoms***, in that Sgt. Burton had no reasonable and probable grounds to make a Breathalyzer demand. This case is therefore a determination of whether, in the circumstances, the police had reasonable and probable grounds to make a Breathalyzer demand of the accused.

### Analysis and Findings of Fact

**[5]** Throughout the arguments presented at the end of and during the trial it became obvious that the defence objective was to assert a challenge based upon its perception that the police had no reasonable and probable grounds to make a Breathalyzer demand of the accused. This

was based, in part, upon the contention that on the salient facts leading to an opinion of impairment, too many discrepancies existed. In this regard, the defence submitted that the testimonial evidence of the supposed indicia of impairment attested to by Sgt. Burton did not coincide with his observations noted and recorded on the Criminal Alcohol Driving Report or in his notes. Further, the initial swerving of the accused vehicle was a neutral factor that did not logically warrant an exclusive conclusion that the accused ability to operate a vehicle was impaired by alcohol or even that the accused had alcohol in his body. Initially, the police had no suspicion that the accused had alcohol in his system and it was only after the stop and he was in the police vehicle for the officer to get a better understanding of the circumstances that the police determined that he was probably impaired.

**[6]** Crown counsel argued that on a careful analysis of the facts, the police did have reasonable and probable grounds. Here, no ***Charter*** breach existed. Further, even if there existed no reasonable and probable grounds it did not vitiate the reception into evidence of the Certificate of a Qualified Technician concerning the results of the accused breath samples.

**[7]** A valid criticism, in my view, was raised by defence counsel when he argued that all too often in these type of cases the police are inclined to state indicia of impairment that upon close examination they are unable to articulate effectively. To support his contention, he pointed to the discrepancies between the police's testimony and their recorded notes and documents.

**[8]** However, on the totality of the evidence and on my observations of the witnesses and my assessment of their testimonies I conclude and find that, in the case at bar, Sgt. Burton had articulable cause to stop the accused. I find that he was travelling behind the accused vehicle when he noted that it suddenly swung into another lane causing another driver to brake to avoid a collision. Further, I find that he noted that the vehicle accelerated for five hundred metres from a stop to 100 kilometres an hour in a 50kph zone. As this was a speeding violation under the ***Motor Vehicle Act***, R.S.N.S. 1989, c. 293 and because a road safety-related infraction existed the officer had statutory authority to stop the offending vehicle. Thus, there is no contention that the stop was lawful.

**[9]** The basis of the disagreement between the parties arose from what next occurred. I, however, find that as determined in ***R. v. MacLennan*** 1995 CanRepNS 70, 11 M.V.R. (3d) 42, 138 N.S.R. (2d) 369 (N.S.C.A) 12, that while Sgt. Burton was inspecting the accused papers, and having detained him, using this opportunity to look for and to detect only passive emanations of impairment, was legitimate. This included such activities as the manner of speech and movements of the accused particularly as the officer requested him to accompany him to the police vehicle. These passive indicia displayed by the accused, in combination with other passive emanations such as the odour of alcohol originating from his body and the manner of operating the vehicle before he stopped it, would, I think, lead the police to have a reasonable suspicion that the accused had alcohol in his body. See also: ***R. v. Medwyk***, [1998] N.S.J. No. 364.

**[10]** Here, I find that Sgt. Burton, an experienced police officer and a qualified Breathalyzer technician, thought that it was odd for the time of year for the accused to be driving with his windows rolled down. The swerving of the vehicle might have been neutral but when added to the unusual burst of speed and the open windows the officer's suspicions were aroused. When the accused lit a cigar the officer surmised further that the accused was attempting to camouflage or to diffuse any telltale odour of alcohol and the open window was intended to "wash away" the smell. Observing the accused fumbling when retrieving his papers, his bloodshot eyes, slurred speech, slight swaying when walking to the police cruiser and the smell of alcohol when he was away from the cigar smoke in the stopped vehicle, the officer formulated the opinion that the accused was impaired by alcohol that affected his ability to operate a motor vehicle.

**[11]** I do not think that here the accused was stopped arbitrarily. He was stopped because of an objective criterion based upon Sgt. Burton's observation of the manner in which he was operating the vehicle. The officer then used this opportunity to detect passive emanations of impairment. As there existed valid grounds for the stop the observations of the officer formed the valid basis for making the demand.

**[12]** In my view, the reasonable suspicion of the presence of alcohol in the accused body is sufficient to justify an ALERT demand under s. 254(2) of the ***Criminal Code***. However, the same set of factors as stated by Freeman J.A., in ***MacLennan***, at para. 63:

> may also result in the formation of a reasonable belief sufficient to justify a breathalyser demand or arrest for impaired driving without the necessity of an ALERT test.

**[13]** Here, on the evidence, I conclude and find that Sgt. Burton's observations of the accused condition disclosed grounds to give him the necessary reasonable belief sufficient to justify a demand or arrest for impaired driving without the necessity of an ALERT test. Put another way, I find that he had reasonable and probable grounds to believe that the accused was impaired by alcohol. Subsequently, he told the accused that he was under arrest for impaired driving and that he had the right to retain and instruct counsel. He also informed the accused of the police caution and then read to him the breath demand. I find no fault with this process.

**[14]** Because Sgt. Burton had reasonable and probable grounds to demand a breath sample and to arrest the accused for an offence contrary to the ***Criminal Code***, s. 253(a) the accused was not arbitrarily detained contrary to the ***Canadian Charter of Rights and Freedoms***, s.9. ***R. v. Strehl***, [2001] O.J. No. 1335 (Ont. S.C.J.).

**[15]** Since there was no arbitrary detention and Sgt. Burton had reasonable and probable grounds to make a demand for breath samples and to detain the accused, I find that there was no infraction of the ***Canadian Charter of Rights and Freedoms***, s.8. The provision of the breath samples was after the accused was advised that he had the right to retain and instruct

counsel and after he had spoken to a lawyer. Therefore, since the samples of breath were taken from the accused pursuant to a demand made under s. 254 ***Criminal Code,*** I find that the technician's certificate is admissible. ***R. v. Walsh*** (1980), 53 C.C.C. (2d) 568 (Ont. C.A.), ***R. v. Hall*** (1981), 57 C.C.C. (2d) 305 (Alta. C.A.). It disclosed that the readings were 120 milligrams and 110 milligrams of alcohol in 100 millilitres of his blood. I accept and find accordingly.

**[16]** Defence counsel also raised the issue that the samples were not taken as soon as practicable. He pointed to the fact that the accused was stopped at 0130 hours, but the demand was made at 0140 hours and that the first sample was taken at 0227 hours. He, however, did not point to any perceived unreasonable conduct of the police, having regard to all the circumstances. Nonetheless, he posited that the Crown cannot rely upon the statutory presumption.

**[17]** In ***R. v. Thorburn***, [2001] N.S.J. No. 108, 2001 NSPC 3, when considering the issue of whether breath samples were taken as soon as practicable, this court stated at para.7:

> Essentially, it seems to me that in order for the Crown to avail itself to the presumption that the blood alcohol concentration at the time of the tests was the same at the time of the offence it must comply with the requirement that the samples were taken as soon as practicable and within two hours. However, in my opinion, "as soon as practicable" does not mean that there is a positive burden on the Crown to detail or to explain every minute that the accused is in custody. However, the burden is on the Crown to show that the time that the accused was detained was occupied in pursuing and adhering to lawful processes and procedures and that the police were reasonable in their practices. R. v. Payne (1990), 56 C.C.C. (3d) 548 (Ont. C.A.). There also appears to be a presumption of regularity in the processes and procedures adopted and executed by the police once a prima facie case has been presented by the Crown. R. v. Carter (1981), 59 C.C.C. (2d) 450 (Sask. C.A.). In any event, I must be satisfied on the evidence adduced that the samples were taken within a reasonable time and within the statutory two hours. Carter, supra. folld: R. v. Cambian (1982) 1 C.C.C. (3d) 59, [1983] 2 W.W.R. 250, 18 M.V.R. 160 (B.C.C.A.).

**[18]** Here, I am satisfied, in the absence of any allegations or proof of unreasonable police conduct that the processes and procedures adopted and executed by the police were regular and, on the evidence adduced, I find that the samples were taken within a reasonable time and within the statutory period of three hours.

**[19]** Additionally, I think that it is appropriate to reiterate what this court stated in ***Thorburn*** at para. 15:

> I note however, as an aside, that "as soon as practicable" does not relate to the admissibility of the Certificate. It relates to the right of the Crown to rely on the presumption stated in Criminal Code s. 258 (c). This section provides a procedural shortcut for the Crown if the samples were taken within two hours after the alleged offence. See, for example, R. v. Deruelle, [1992] 2 S.C.R. 663. Here, the Defence did not object to the Certificate's admissibility. Therefore, even if I were to conclude that the breath samples were not taken as soon as practicable and deny the Crown the right to rely upon the presumption, I still have the evidence of the Certificate. Thus, even if the Crown could not rely on the presumption in s. 258 (c), the uncontradicted evidence of blood alcohol concentration, in the form of the Certificate, is before me and is admissible. I would therefore still be obligated to weigh this evidence with all the other evidence of the case, particularly, as here, where the Constable had formed a belief that within the preceding three hours the accused had committed a drinking and driving offence. Deurelle, supra, Cambian, supra, at pp. 63-64. Thus, on the evidence before me the accused could still be convicted of having a blood alcohol concentration in excess of the legal limit.

**[20]** I will apply the same reasoning to the case at bar.

**[21]** I think that as the test for impairment as stated in ***R. v. Stellato*** (1990), 78 C.C.C. (3d) 380 (Ont. C.A.) Leave to appeal to S.C.C. granted 83 C.C.C. (3d) vi, Affirmed 90 C.C.C. (3d) 160 requires some degree of impairment only, there is sufficient evidence before me, such as the unexplained swerving into another lane, the unexplained burst of speed, slurred speech, bloodshot eyes and smell of alcohol for me reasonably to conclude and find that the accused had the control of his vehicle while his ability to operate it was impaired by alcohol. I so conclude and find accordingly.

## Conclusions

**[22]** On the evidence that I accept and on the analysis that I have made, I am satisfied that the police had reasonable and probable grounds to make a breath demand of the accused. Further, I am satisfied that the police did not violate the accused s.8 ***Charter*** rights and that the Certificate of a Qualified Technician stating the results of the breath samples is admissible. I accept and find that the readings stated on the Certificate show that the accused blood alcohol level exceeded the legal limit when he had the control of a motor vehicle. Moreover, I am satisfied that the samples were taken within a reasonable time and within the statutory period of three hours.

**[23]** Therefore, I am satisfied that, as a result, the Crown has proved beyond a reasonable doubt

that the accused operated his motor vehicle when his ability to operate it was impaired by alcohol. Additionally, I am satisfied that the Crown has proved beyond a reasonable doubt that the accused blood alcohol level exceeded the legal limit of 80 milligrams of alcohol in 100 millilitres of blood when he was operating a motor vehicle. I find him guilty as charged. However, applying the ***Kienapple*** principle, I will enter a conviction on the over “80" offence and enter a conditional stay on the impaired driving offence.

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