IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Andrea, 2003 NSPC 007

Date: 20030321
Docket: 1256480
Registry: Halifax

Between:

Her Majesty the Queen

v.

Martin Michael Andrea

Judge:	The Honourable Judge Crawford
Heard:	February 6, 2003, in Halifax, Nova Scotia
Written Decision:	March 21, 2003
Counsel:	Richard B. Miller, for the Crown Brian Casey, for the Defence

By the Court:

[1] The defendant is charged under s. 253(b) of the *Criminal Code* with driving with a blood alcohol level greater than 80 milligrams of alcohol in 100 millilitres of blood.

Issues

[2] The defendant seeks a dismissal of the charge because the Crown has failed to establish the existence of reasonable and probable grounds for the police officer to make the breathalyzer demand. The defence argues that the demand was therefore invalid, that the resulting breath tests constituted an illegal search under s. 8 of the *Charter of Rights and Freedoms* and that the evidence of those tests should be excluded under s. 24(2) of the *Charter*, which would necessarily result in the dismissal of the charge for lack of evidence.

[3] The Crown replies that there were sufficient grounds for the demand or, if there were not, that the results of the breath tests should still be admitted under s. 24(2) as not bringing the administration of justice into disrepute.

Facts relating to the demand

[4] Cst. Thomas of the Halifax Regional Police testified that at approx 2 a.m. on November 16, 2002 he followed the defendant's vehicle for a distance of approximately one kilometer from McDonald’s on Quinpool Road in the Halifax Regional Municipality to a point on the same road between Horseshoe Island and the Rotary. The defendant was speeding at seventy kilometers per hour in a fifty kilometer zone and did not stop at either of two flashing red lights. After he went through the second flashing light, the officer engaged his emergency lights and it took the defendant a distance of five blocks to react to the lights and stop.

[5] When the officer first approached the defendant, he noted that the defendant was eating a package of McDonald’s french fries. After he had finished eating, the officer observed a light smell of alcohol from the defendant's breath. He also noted that the defendant’s eyes were glassy with enlarged pupils, that he fumbled with his papers and that he seemed thick-tongued in his speech.

[6] At this point, while the defendant was still in his own vehicle, Cst. Thomas reached the conclusion that the defendant was impaired by alcohol while operating a motor vehicle and advised him that he was under arrest. He placed the defendant in his police car, not noting any irregularities in his walking.

[7] As the defendant admits all elements of the offence other than grounds for the demand, it is not necessary to recite further facts here.

Discussion

1. Reasonable and Probable Grounds

[8] On this element of the offence, as on all others, the burden is on the Crown to prove that the police officer had reasonable and probable grounds to make the demand. The Crown points to the facts recited by the arresting officer as establishing the necessary grounds:

1. speeding at 70 km/hr in a 50 km zone;
2. fast rolling stops through 2 flashing red lights;
3. light odour of alcohol on the breath after eating french fries;
4. fumbling with papers
5. glossy eyes
6. large pupils
7. thick-tongued speech.

[9] The defence argues that the driving irregularities noted, viz. speeding by twenty kilometers per hour, and fast rolling stops through flashing lights, can be explained by driver inattention due to eating and/or the light traffic and time of night and that, although the remaining indicia would certainly be sufficient for the officer to make a screening device demand, they are not sufficient to ground a breathalyzer demand.

[10] To accept the defence argument on this point would be to commit the error warned against in *R. v. Huddle,* [1989] A.J. No. 1061 (Alta. C.A.) at A.J. p. 2:

> In our view, it is an error in law to test individual pieces of evidence which are offered to establish the existence of reasonable and probable grounds. That is similar to the approach which the Supreme Court of Canada condemned in Morin. True, the smell of alcohol does not show impairment; slurred speech alone does not show impairment by alcohol; glassy eyes may be associated with crying; but, the question is whether the total of the evidence offered provided reasonable and proper grounds, on an objective standard. We say that because no issue of subjective belief arises here.
>
> The question of the weight to be ascribed to all of those factors is essentially one for a trial court, applying all the evidence on that issue.

[11] In regard to whether the officer should have given a screening device demand rather than the breathalyzer demand, in *R. v. MacLennan*, [1995] N.S.J. (C.A.) No. 77 Freeman, J. for the court stated:

> ¶58 In this case Constable Byrne did not give Mr. MacLennan an ALERT demand. She gave him the breathalyzer demand instead. There was nothing inappropriate about this. As noted above, there is an incubation period while a driver is observed during the inspection of documents when a police officer may form the reasonable suspicion prerequisite to the ALERT demand. There are two other possibilities. The usual one is that no suspicion of drinking may arise and the driver is free to leave. The other possibility is that during the incubation period the indicia of impairment strike the officer so forcefully that there is no need for the screening test; the officer forms a reasonable and probable belief that the driver is impaired and no further evidence is required. In that event either the driver is given the breathalyzer demand or arrested for impaired driving. While the reasonable and probable grounds necessary to support the breathalyzer demand or an arrest are of a much higher standard than the reasonable suspicion needed for the ALERT demand, this is only a matter of degree. While the framework was created to permit screening tests with the ALERT machine as discussed in Bernshaw, an ALERT demand is not necessary to justify the preceding period of detention without the right to counsel. In most circumstances a failing result on the ALERT is all the evidence needed to support a breathalyzer demand, but the ALERT result is not a necessary part of the evidence if other grounds exist.

[12] In the present case, although some or all of the indicia recited by the police officer may have had other explanations, I find that when taken together they are more than sufficient to meet the required standard of “reasonable and probable grounds to believe that an offence had been committed”, or in the words of MacDonald, J.A. in R. v. Trask, [1987] N.S.J. No. 365 “whether a reasonable man having the means of knowledge available to Cst. [Thomas] at the time might come to the conclusion that

the appellant probably" had a blood alcohol level over 80 milligrams in 100 millilitres of blood. It was therefore not necessary for him to make a screening device demand.

[13] I find that the Crown has established that the police officer had reasonable and probable grounds to make the demand.

2. Exclusion of Evidence under *Charter* s. 24(2)

[14] Having found that the police officer made a properly grounded demand, I do not need to consider *Charter* remedies and can leave for another court, or another occasion the vexed question of when, if ever, *Rilling* still applies in Nova Scotia.