COUNTY OF LUNENBURG
PROVINCE OF NOVA SCOTIA
2002 CASE NO: 1102216 & 1102217

IN THE PROVINCIAL COURT OF NOVA SCOTIA
[Cite as: R. v. Tripp, 2002 NSPC 029]

HER MAJESTY THE QUEEN

versus

WAYNE LEWIS TRIPP

DECISION

HEARD BEFORE: THE HONOURABLE JUDGE ANNE E. CRAWFORD, J.P.C.

PLACE HEARD: BRIDGEWATER, N.S.

DATE HEARD: FEBRUARY 07, 2002

CHARGE: ...did unlawfully operate a motor vehicle while his ability to operate the vehicle was impaired by alcohol, or a drug, contrary to Section 253 (a) of the **Criminal Code of Canada**

and

...did unlawfully operate a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253 (b) of the **Criminal Code of Canada**

COUNSEL: HERMAN FELDERHOF, CROWN ATTORNEY
RONALD MORRIS, DEFENCE ATTORNEY

[1] Wayne Tripp is charged under s. 253(a) and (b) of the Criminal Code with driving while impaired and with operation of a motor vehicle with a blood alcohol level in excess of the legal limit.

Facts

[2] At 9:20 p.m. on September 2, 2001 Sgt. Sutherland of the Bridgewater Police Department received a radio transmission regarding trouble at the Bridgewater Motor Inn on High Street in Bridgewater, Nova Scotia. Units were told to be on the look-out for a possible impaired driver in a small blue Plymouth.

[3] Sgt. Sutherland attended there and saw nothing, so he continued along High Street to Victoria Road, across the bridge and up the hill to head out to the 103 highway, looking for the vehicle. As he passed the Wandlyn Inn on North Street he saw a car matching the description he had been given backing into a parking spot in the parking lot.

[4] He turned into the parking lot to investigate, saw that the car was a Plymouth Acclaim, bluish green in colour and pulled his police vehicle in front of it. He went to the driver's window; the defendant, whom he identified, was sitting in the driver's seat; there was a woman in the front passenger seat and another woman in the back seat.

[5] He asked the defendant for identification, at which point the two women, particularly the one in the back seat, began to interfere with Sgt. Sutherland's conversation with the defendant. Sgt. Sutherland asked him to step out of his car, which he did. As the police officer again asked him for his papers, he noted a significant smell of alcohol from the defendant's breath.

[6] Cst. Brekker, also of the Bridgewater Police, arrived on the scene, and because the two

women were continuing to cause problems, Sgt. Sutherland turned the defendant over to him, telling him that the defendant had been operating a motor vehicle and had been drinking. Sgt. Sutherland asked Cst. Brekker to give the defendant the SL-2 device demand and administer the test. Sgt Sutherland knew that Cst. Brekker had an SL-2 device with him in his police car.

[7] Cst. Brekker testified that he had an SL-2 in his police car and described it as an approved screening device. Cst. Brekker asked the defendant to go with him to his police vehicle and the defendant did so. Cst. Brekker said that the defendant was very co-operative, that he smelled the odour of alcohol from the defendant's breath and that he noted that the defendant had some difficulty walking.

[8] He placed the defendant in the back seat of the police car and read him the approved screening device demand. The defendant said that he understood the demand and agreed to take the test. On cross examination Cst. Brekker testified that he had been trained in the use of the S-L2 device at the Police Academy and had known it since then to be an approved screening device. The defendant blew a "fail" on that device at 9:33 p.m.

[9] Cst. Brekker then read the defendant his Charter rights, including the right to apply for Legal Aid, but not the right to consult duty counsel free of charge. The defendant said that he understood what had been read to him and did not want to call a lawyer. He agreed to take the breathalyzer test when that demand was read to him.

[10] Cst. Brekker then took the defendant directly back to the police office, a five minute drive. On cross-examination Cst. Brekker said that en route he asked the defendant again if he wanted to contact a lawyer. He remembered doing this because the defendant is with the military and Cst. Brekker specifically informed him that he had the right to a military lawyer

and that the police department would try to contact one for him, or would contact Legal Aid for him.

[11] Cst. Brekker said that the defendant was very co-operative throughout and declined all offers to contact counsel for him.

[12] He was taken directly to the breathalyzer room at the police station, where he was again offered the opportunity to contact a lawyer, which he again declined. The breath tests were performed by a qualified technician who prepared the usual certificate which was properly served on the defendant by Cst. Brekker.

Issues

[13] The defendant objects to the admissibility of the Certificate of Qualified Technician on two grounds:

> (1) that there is no evidence that the "SL-2 device" which Cst Brekker used was an "approved screening device" as required under s. 254(2) and/or
>
> (2) the defendant was not informed of his right to counsel after the s. 253(b) demand.

[14] A third issue is the effect, if any, of Cst. Brekker's not including information as to the immediate availability of free duty counsel in his reading of the right to counsel to the defendant.

"approved screening device"

[15] S. 254 (2) of the *Criminal Code* states:

> (2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel or aircraft or of railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

[16] The *Approved Screening Devices Order*, SI/85-200, s. 2 states:

> 2. The following devices, each being a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person, are hereby approved for the purposes of section 254 of the Criminal Code:
> (a) Alcolmeter S-L2;
> (b) Alco-Sûr;
> (c) Alcotest(R) 7410 PA3;
> (d) Alcotest® 7410 GLC;
> (e) Alco-Sensor IV DWF;
> (f) Alco-Sensor IV PWF; and
> (g) Intoxilyzer 400D.

[17] The defendant submits that because neither police officer identified the screening device with the full name “Alcolmeter S-L2" as set out in s. 2 of the above-quoted *Order*, the Crown has not established to the requisite criminal standard that the device used was an “approved screening device” within the meaning of these sections. And, if that is the case, then the defendant’s failing the test has no meaning and cannot serve as reasonable grounds for the breathalyzer demand. The lack of reasonable grounds means that the demand was illegal and the certificate must be excluded.

[18] Counsel for the defence it must be noted is a member of the New Brunswick bar and is a resident of New Brunswick, as is his client. He cited as support for his argument *R.* v. *Jones*, 2001 NBQB 186 and the cases cited therein.

[19] During a noon-hour recess I attempted to find Nova Scotia cases on point, and later provided to counsel copies of *R.* v. *Lebrun* [1999] N.S.J. No. 288 (S.C.) and *R.* v. *Dubois* [2001] N.S.J. No. 23 (P.C.).

[20] In *Jones* the police officer said that the device he used was a “Draeger 7410 GLC”. There is no such device listed in the *Approved Screening Devices Order*, the closest being “(d) Alcotest® 7410 GLC”.

[21] In *Lebrun*, the Crown conceded that the evidence did not establish that the device described by its witnesses at trial as “‘an Alco-Test 74010' model; ‘Dragger is the make,’” was an approved screening device.

[22] In *Dubois* no evidence was given as to the particular make or model of the roadside screening device, but the officer testified that it was an approved screening device, and this was held by the court to be sufficient proof of the matter, in the absence of any evidence to the contrary.

[23] Hawkins, J. in *R.* v. *Choudry* [1997] O.J. No. 6278 summarized several similar Ontario cases as follows:

> ¶¶1 **HAWKINS J.** (endorsement):—— The accused was stopped at a spot check by P.C. Howard Stirling. P.C. Stirling smelled alcohol. There were no other indicia of impairment. He had the accused blow into a roadside screening device which Stirling described as a "Drager Alcotest GLC". The accused blew a "fail", was arrested and later blew over 80 on an approved breathalyser. If Stirling didn't have reasonable and probable grounds for believing he was over 80 he had no authority to arrest him and demand that he provide a sample. The sole basis for P.C. Stirling's belief was the "fail" which the accused blew on the roadside screening device. The approved screening devices under s. 255 are (a) "Alcolmeter S-L2", (b) "ALCO-SUR", (c) "ALCOTEST 7410 PA3" and (d) "ALCOTEST 7410 GLC" "Drager Alcotest GLC" is close but not "bang-on".

> ¶¶ 2 In R. v. Alatyppo (1983) 20 M.V.R. 39 (Ont. C.A.), the court held that the description "breathalyser instrument" was insufficient to establish that the instrument was an "approved instrument: and indicated, OBITER, that if the officer had referred to it as an "approved instrument" that would, in the absence of challenge have been sufficient.
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> ¶¶ 3 In R. v. Kosa (1992) 42 M.V.R. (2d) 290 (Ont. C.A.), the Court held that "Model JA3" was no more than a mere "misdescription" of "Model J3A" and the further assertion by the officer that it was an approved screening device was sufficient proof thereof.
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> ¶¶ 4 In this instant case the officer used the magic work "approved" but he did so in conjunction with a specific description of a roadside screening device that is not, as so described, an approved device.
>
> ¶¶ 5 The officer in Alatyppo didn't say enough. P.C. Stirling said too much. I agree with the disposition made by the learned trial judge. The crown's appeal is dismissed.

[24] In *Jones, LeBrun,* and *Choudhry* there was more than mere omission; there was misdescription. In *Kosa* and *Dubois* the assertion that the device used was an approved screening device was held to be sufficient proof.

[25] In the present case both police officers referred to the device Cst Brekker used as the “S-L2". Cst. Brekker testified that it was, to his knowledge, an approved screening device. Neither mentioned the word “Alcolmeter”. In my opinion an accurate but incomplete description with an assertion, based on training and experience, that the device used was an approved screening device is sufficient evidence to establish beyond reasonable doubt that the device into which the defendant blew at the scene was an approved screening device. I therefore find that Cst. Brekker had reasonable and probable grounds to make the breathalyzer demand.

Right to Counsel

[26] The defence submits that the defendant's *Charter* s. 10(b) right to counsel was breached because he was informed of it *before* and not after the breathalyzer demand was read. The demand created a new jeopardy which required that he be given his right to counsel again.

[27] Although this argument would have merit in an appropriate case, (such as *R.* v. *Black*, [1989] 2 S.C.R. 138, 50 C.C.C. (3d) 1, 70 C.R. (3d) 97) where, as here, the right to counsel was immediately followed by the breathalyzer demand and was part of the same single incident, I find that s. 10(b) was complied with. *R.* v. *Schmautz*, (1990) 1 S.C.R. 398, 53 C.C.C. (3d) 556. In addition there was discussion after the demand and offers by the police to contact Legal Aid or a military lawyer for the defendant, all of which offers were declined by the defendant, a clear and unequivocal waiver of his right to counsel.

[28] There remains the issue of the failure of Cst. Brekker to advise the defendant of his right to access duty counsel. This is a clear breach of the defendant's s. 10(b) right to counsel, as stated in *R.* v. *Hall,* [2001] N.S.J. No. 431, 2001

NSPC 29 (2001) 198 N.S.R. (2d) 201 (N.S.P.C.). I should therefore consider s. 24(2) of the *Charter*:

> 24. (1)Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2)Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[29] However, as this issue was not addressed by counsel and I have no application regarding it before me, I will leave it to counsel as to what further, if any, applications or submissions they may wish to make before deciding the admissibility of the certificate.

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The Honourable Judge Anne E. Crawford