COUNTY OF LUNENBURG
PROVINCE OF NOVA SCOTIA
2002 NO: 1086425

IN THE PROVINCIAL COURT OF NOVA SCOTIA

[Cite as: R. v. Toope, 2002 NSPC 030]

HER MAJESTY THE QUEEN

versus

KEITH STEWART TOOPE

DECISION

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

PLACE HEARD: BRIDGEWATER, N.S.

DATE HEARD: AUGUST 13, 2002

CHARGE: ...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: ANTHONY BROWN, CROWN ATTORNEY
MARK DEMPSEY, DEFENCE ATTORNEY

[1] Stewart Keith Toope has been charged under s. 253(b) of the Criminal Code with driving with a blood alcohol level over the legal limit.

[2] Defence raised two issues, but as I can dispose of this matter on the first issue, I will deal only with it and the facts directly related to it.

Facts

[3] On June 28, 2001 Cst. Ramey of the Bridgewater Police Department responded to an anonymous complaint, received at 7:20 p.m. that the defendant had been drinking and was now driving. He searched for the defendant's motor vehicle and at 8:26 p.m. he spotted him on Dufferin Street in the Town of Bridgewater. He followed him along High Street and stopped him on Empire. He noted no driving irregularities during this short pursuit at normal speed.

[4] Cst. Ramey informed the defendant as to why he had been stopped. The defendant denied drinking and denied having open liquor in his car, but Cst. Ramey could smell liquor on his breath and, when the defendant opened his glove box to produce his driving and vehicle permits, Cst. Ramey saw an open "mickey" bottle of rum, which was seized and produced in evidence before me.

[5] As a result at 8:30 p.m. Cst. Ramey made the Screening Device demand, reading it from his card. Cst. Ramey called Cst. O'Quinn to bring the "SL-2" and do the

test, which was performed at 8:35 p.m. The defendant failed the test and the breathalyzer demand followed.

Issue

[6] The defendant objects to the admissibility of the Certificate of Qualified Technician on the ground that there is no evidence that the "SL-2 device" which Cst O'Quinn used was an "approved screening device" as required under s. 254(2).

Discussion

[7] 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.

[8] 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.

[9] 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*, and there is no evidence that the "SL2" referred to by the officers was an approved screening device, 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.

[10] I had occasion to deal with a similar case recently, *R.* v. *Tripp* (unrep. N.S.P.Ct. 2002 Case No. 1102216 & 1102217) in which I reviewed the relevant case law and concluded:

> [24] In *Jones* [2001 NBQB 186], *LeBrun* [1999] N.S.J. No. 288 (S.C.)], and *Choudhry* [[1997] O.J. No. 6278] there was more than mere omission; there was misdescription. In *Kosa* [(1992) 42 M.V.R. (2d) 290 (Ont. C.A.)] and *Dubois*[[2001] N.S.J. No. 23 (P.C.)] 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. [Citations added]

[11] Unlike *Tripp*, in the present case there was no testimony as to whether or not the "SL2" was an approved screening device. In the absence of any such evidence, the Crown cannot be held to have established beyond reasonable doubt that the device used was approved within the meaning of s. 254(2).

[12] The failure to so prove means that the Crown cannot establish that Cst. Ramey had reasonable and probable grounds under s. 254(3) to make the breathalyzer demand. The demand was therefore illegal and the results of the test made pursuant to the illegal demand must be excluded.

Conclusion

[13] As the certificate must be excluded for the foregoing reason, I find it unnecessary to consider the defendant's second argument on right to counsel. It is sufficient to say that, for the reasons outlined above, the defendant is not guilty of the offence charged.

Judge Anne E. Crawford, J.P.C.