IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. White*, 2006 NSPC 42

Date: 20060925
Docket: 1606108 and 1606109
Registry: Truro

Between:

Her Majesty the Queen

Informant

v.

Ryan Matthew White

Defendant

Judge(s): The Honourable Judge John G. MacDougall

Heard: June 6, 2006 and September 5, 2006, in Truro, Nova Scotia

Written decision: September 25, 2006

Charge: THAT on or about the 23rd day of December A.D. 2005, at or near Truro, in the County of Colchester, Province of Nova Scotia, did having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, did have the care or control a motor vehicle, to wit: 1996 Jeep, contrary to Section 253(b) of the *Criminal Code*.

AND FURTHER, at or near Truro, in the County of Colchester, Nova Scotia, on or about the 23rd day of December, 2005 while his ability to operate a motor vehicle was impaired by alcohol or a drug, did have the care or control of a motor vehicle, to wit: 1996 Jeep, contrary to Section 253(a) of the *Criminal Code*.

Counsel: John Nisbet, for the Crown
Robert Cragg, for the Defendant

By the Court:

[1] Ryan Matthew White and a few friends left Kennetcook, Hants County, Nova Scotia, to party in Truro, an hours drive away. He had been drinking beer and intended to drink more before the night was over. John MacDonald, a non-drinker, was the designated driver of a vehicle owned by a third party.

[2] Late in the evening, Mr. White found himself ejected from a bar. He acquired the keys from Mr. MacDonald and intended to wait in the vehicle for his friends. He entered the vehicle through the driver's door (which was the only one that allowed access without the alarm going off), sat in the driver's seat, started the car to engage the heater, reclined the seat to stretch out and went to sleep. December 23rd was a cold night and it was necessary to have the engine running to keep the vehicle warm. Mr. White's intention was to wait for his friends and allow Mr. MacDonald to drive them home.

[3] Mr. White was awakened shortly after falling asleep by Constable Cullip of the Truro Police. He explained that he was waiting for friends but was arrested and taken to the police detachment for purposes of supplying a breath sample pursuant to a breath demand. He provided the required samples and was charged under section 253(a) and (b) of the *Criminal Code*. The defence raises the following issues:

A. Did Mr. White have care and control of the vehicle?

[4] I find as a fact that Mr. White entered the vehicle without the intention of putting it in motion, successfully rebutting the presumption set out in Section 258(1)(a) of the *Code*.

[5] The operative words of s. 253 are whether the Defendant had "care **or** control" of the motor vehicle. The Supreme Court of Canada in *R. v. Toews*, [1985] 2 S.C.R. 119 stated:

> ...Acts of care or control, short or driving, involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion.

Mr. Toews was found not to be in care or control when he entered the vehicle to sleep and was found in a sleeping bag, not in the driver's seat. There was no direct evidence that he put the key in the ignition and turned on the stereo.

[6] Cromwell, J.A. in *R. v. Lockerby* (2000), 139 C.C.C. (3d) 314, provided an extensive analysis of what constitutes care or control of a motor vehicle. He states at page 319-320:

> In my view, when a person with more than the legal limit of alcohol in his blood has the present ability to make the car respond to his wishes, there is a risk that the car may be placed in motion, even where the person's intentions are not to do so.
>
> A person who has the present ability to operate the vehicle, who has its superintendence or management, is in control of it.

[7] I am satisfied the Crown has met the *Toews* test as articulated by Cromwell, J.A., that in sitting in the driver's seat and starting the car Mr. White has placed himself in control of it, regardless of his intention to put it in motion.

B. Were the breathalyzer samples taken at least fifteen minutes apart, and what is the result of samples being taken within 15 minutes of each other?

[8] Section 258.(1)(c)(ii) requires that the samples which are taken pursuant to a demand be taken "...with an interval of at least fifteen minutes between the times when the samples were taken." Constable Lake, a qualified breathalyzer technician, was alert to this requirement and gave evidence that the first sample was taken at 3:00 a.m., the second at 3:18 a.m. and the third at 3:34 a.m. On the evidence, I am satisfied the samples were taken as required by law as determined by *R. v. Perry* (1978), 41 C.C.C. (2d) 182, and *R. v. Atkinson*, [1980] 42 M.V.R. 78 (NSCA).

C. Did the police have requisite reasonable and probable grounds to ask Mr. White to accompany them to the police detachment for the purpose of taking the breathalyzer test?

[9] It is settled law that the grounds for what constitutes reasonable and probable grounds to demand a defendant comply with a breath demand must be strong and objective although they need not be conclusive of guilt, *R. v. Murphy* (1972), 5 C.C.C. (2d) (NSCA), *R. v. Trask*, [1988] 81 N.S.R. 376 (NSCA). A review of the grounds must be in the context of what appeared to the police officer at the time of the demand: *R. v. Dykens* (1980), 39 N.S.R. (2d) 361. A defendant may be convicted when a police officer's belief has been proven to be wrong as long as it was held on reasonable and probable grounds: *R. v. Tarashuk* (1975), 25 C.C.C. (2d) 108. To establish "criminal impairment", I must be satisfied beyond a reasonable doubt that the defendant's ability to operate the motor vehicle was impaired by alcohol even to a slight degree *R. v. Stiletto*, [1993] 78 C.C.C. 380 (O.C.A.) and approved by the Supreme Court of Canada, [1994] 90 C.C.C. 160.

[10] Constable Cullip gave evidence that about 2:20 a.m. on the day in question he responded to a call. A person was asleep/passed out in a motor vehicle in a parking lot. Upon arrival he saw the defendant sleeping, slightly reclined in the

driver's seat. An unopened bottle of beer was located between the front seats and some empty beer bottles and cans littered the rear of the vehicle. Upon being awakened, the defendant was alert and exited the motor vehicle to speak with the officer. Constable Cullip noted: "his eyes were red and glazed over, glossy, and had a strong odour of an alcoholic beverage coming from his breath and he was slightly unsteady on his feed as he was standing there talking to us." During the conversation the defendant advised he had been to a local bar and was waiting for his friends. His speech appeared fine.

[11] Based upon the aforementioned observations, Constable Cullip formed the opinion that the defendant was in care and control of the motor vehicle while his ability to operate the vehicle was impaired by alcohol. The issue is not whether Constable Cullip's opinion was correct, but whether there is evidence upon which I can conclude it was reasonable. The standard of criminal impairment was recently reviewed by the Nova Scotia Court of Appeal in *R. v. Ryan* (2002), 170 C.C.C. (3d) 353. In her decision, Justice Oland noted the Summary Conviction Appeal Court judge made the following observations:

> [10] . . . He quoted para. 16 of *R. v. Landes*, [1997] S.J. No. 785 (QL) (Sask. Q.B.) [reported 161 Sask. R. 305], as follows:
>
> > An opinion as to impairment, be it the trial judge or a non-expert, must meet an objective standard of "an ordinary citizen" or a "reasonable person" in order to avoid the uncertainties associated with subjective standards, particularly when based on inferences. To

> that end a list of tests and observations has been developed for use by peace officers and courts in determining whether an accused's mental faculties and physical motor skills were impaired by alcohol to the degree of impairing the accused's ability to drive a motor vehicle. Those observations and tests include: (1) evidence of improper or abnormal driving by the accused; (2) presence of bloodshot or watery eyes; (3) presence of a flushed face; (4) odour of an alcohol beverage; (5) slurred speech; (6) lack of coordination and inability to perform physical tests; (7) lack of comprehension; and (8) inappropriate behaviour.

[11] The main difficulty the summary conviction appeal court judge had with the Crown's case was the lack of conduct or function evidence. He stated:

> There was no evidence that Mr. Ryan's coordination or balance were impaired. There was no evidence that he stumbled or was unsteady on his feet. There was no evidence of his being clumsy, dropping or spilling. There was no evidence of any "roadside" performance tests: because apparently none were conducted.
>
> Taken together, the evidence of the Crown's witnesses implies the appellant had no difficulty getting in and out of vehicles, walking into the police station, making the telephone call to the duty lawyer, and cooperating with the efforts of Constable MacDonald to administer the breathalyzer test. At the very least, there is no evidence to the contrary.
>
> None of the three *indicia* of impairment observed by Constable Clarke could be said to impugn the accused's reaction, response, or concentration skills. Aside from slurred speech, there was no evidence suggesting lack of coordination or impaired motor functioning.
>
> . . . . .
>
> Constable Clarke testified that in her opinion, Mr. Ryan was "heavily intoxicated". From the evidence that I have recited, it is clear that she did not provide evidence upon which the Learned Trial Judge could properly evaluate her opinion. An opinion cannot stand on its own. It must be based upon the evidence. If the evidence is lacking, the opinion is meaningless.

> ...Criminal impairment is a matter of fact for the trial judge to decide on the evidence and is subject to the criminal standard of proof beyond a reasonable doubt.

[12] The test to be applied to determine if Constable Cullip's opinion was reasonable is in the context of impairment as defined by the *Ryan* decision and the effect, if any, alcohol ingestion had on the mental faculties and physical motor skills of Mr. White. Although it would not be proper to dissect the *indicia* of impairment observed by Constable Cullip, it is not disputed the only unequivocal sign of impairment was the "slight unsteadiness" that was observed as they spoke. There is no evidence that this difficulty was more than momentary or became more pronounced. Constable Cullip may have had reasonable grounds to suspect an impaired ability to operate a motor vehicle. However, a slight unsteadiness witnessed when a sleeping driver steps from a motor vehicle to speak with a police officer is not sufficient evidence upon which to reasonably conclude his ability to operate a motor vehicle is impaired, whether by alcohol or not.

D. Was the breathalyzer test administered as soon as practicable under the circumstances?

[13] The evidence of Constable Lake is that upon being presented with the defendant, he observed him for a period of 15 minutes while he was preparing

the breathalyzer. The purpose for the wait period is in accordance with his training to ensure nothing has been ingested by the defendant which would contaminate the breath sample. I am satisfied on the evidence, including the unexplained 10 minutes, that the breath sample was taken as soon a reasonable in all the circumstances.

[14] In conclusion, I am of the opinion Constable Cullip did not provide evidence upon which I can conclude he had reasonable and probable grounds to make the breathalyzer demand and, therefore, acquit Mr. White of the first count under s. 253(b). I also acquit him of the second count of having care or control of a motor vehicle while his ability to operate the vehicle was impaired under section 253(a) based on the law as set out in *R. v. Ryan*.

J.