IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Petrie, 2006 NSPC 53

Date: 31 October 2006
Docket: 1589108
Registry: Halifax

Between:

Her Majesty the Queen

v.

Roderick John PETRIE

Judge: The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.

Heard: October 5, 2006, in Dartmouth, Nova Scotia

Written decision: October 31, 2006

Charges: That he, on or about the 26th day of August 2005, at or near Lawrencetown, 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, have the care or control of a motor vehicle, contrary to Section 253(b) of the **Criminal Code**.

AND FURTHERMORE on the same date and place aforesaid, did have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or a drug, contrary to Section 253(a) of the **Criminal Code**.

Counsel: Terri Lipton, for the Crown
Donald Pressé for the Defence

By the Court:

[1] The Court record reflects that on October 5, 2006, upon hearing the evidence and submissions of both Crown and Defence counsel, I found the Accused, Roderick John Petrie, not guilty of the S.253(a) **Criminal Code** charge arising from August 26, 2005. I further found on October 5, 2006 regarding the S.253(b) **Criminal Code** charge, that the peace officer who issued the S.254(3) demand to the Accused, lacked the requisite reasonable and probable grounds basis prescribed in S.254(3) of the **Criminal Code** for the issuance of that demand. Notwithstanding the absence of the requisite grounds to issue the breath sample demand, the Accused, after exercising his right to obtain preliminary legal advice, provided two samples of his breath for analysis by an approved instrument.

[2] It appears that the decision in R. v. Rilling (1976) 24 C.C.C. (2d) 81 is still binding. The lack of reasonable and probable grounds does not render inadmissible certificate evidence of a qualified technician on a charge under S.253(b). A number of courts in other jurisdictions have held that Rilling is no longer the law. Nova Scotia does not appear to be one of those jurisdictions. The decision in R. v. Marshall (1989) 91 N.S.R. (2d) 211 left open the issue because no application was made at trial pursuant to S.24(2)

of the **Charter**. In the case of R. v. Dwernychuk (1993) 77 C.C.C. (3d) 385 (Alta. C.A.) it was held that until the Supreme Court reconsiders R. v. Rilling, the lower courts are bound by that decision. In R. v. Bernshaw (1995) 95 C.C.C. (3d) 193, Cory, J. stated at P. 213:

> "The British Columbia Court of Appeal, in this case, held that *Rilling* was no longer good law since it was decided prior to the Charter.
>
> In my view, the Court of Appeal erred in taking this position. Certainly, the Charter is relevant. An accused may be able to establish on the balance of probabilities that the taking of breath samples infringed his Charter rights. For example, it might be contended that the requisite reasonable and probable grounds for making the breathalyzer demand were absent, and that, in the circumstances, the admission of those breathalyzer results would bring the administration of justice into disrepute. In those circumstances, the breathalyzer evidence might well not be accepted. Yet, where an accused complies with the breathalyzer demand, the Crown need not prove as part of its case that it had reasonable and probable grounds to make that demand. Rather, I think, the onus rests upon the accused to establish on the balance of probabilities that there has been a Charter breach and that, under S.24(2), the evidence should be excluded. There should not be an automatic exclusion of the breathalyzer test results.

[3] I have concluded that the Crown need not establish the existence of reasonable and probable grounds for the certificate of analysis to be admitted in this case. However, the Accused alleges that the absence of reasonable and probable grounds for his arrest and the S.254(3) demand resulted in a breach of his Section 8 and 9 **Charter** rights. The issue to be determined therefore is whether the Accused's S.8 & S.9 **Charter** rights were violated

and if violated, whether evidence of the aforesaid analysis should be excluded as evidence in this trial pursuant to S. 24(2) of the **Charter**. The Accused seeks such exclusion.

The Reasonable and Probable Grounds Issue

[4] In relation to the **Charter** issue, a few more comments relative to the evidence and facts relating to the breath sample demand are appropriate. I offer these comments in the context of the decisions in the cases of R. v. Soczynski (2006) B.C.P.C. 91, and R. v. Andrea (2004) N.S.C.A. 130 being cases submitted by counsel in the course of their oral submissions.

[5] In the decision of R. v. Andrea ,the Nova Scotia Court of Appeal at paragraph 16 quotes from paragraph 48 of the decision in R. v. Bernshaw (supra):

> "The existence of reasonable and probable grounds entails both an objective and a subjective component. That is, S.254(3) of the Code requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief."

[6] At paragraph 17 of the decision in R. v. Soczynski, Ellan, J. quotes the following passage from Chartier v. Attorney General of Quebec (1979), 48 C.C.C. (2d) 34 S.C.C.

> "For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all the information available to him. He is entitled to disregard only what he has good reason for believing not reliable."

Ellan, J. then goes on to state at paragraph 18 of the Soczynski decision the following:

> "...for a demand under S.254(3), an officer must satisfy himself that the observations he or she makes are attributable to alcohol consumption and not to another innocent explanation, and the officer is not entitled to make a demand based simply upon "a quick assessment"."

[7] I believe that the Supreme Court of Canada decision in both the cases of Bernshaw and Chartier require an objective assessment of all the observations that the peace officer attributes to impairment. I acknowledge that observations of the peace officer, offered as evidence of the indicia of impairment to operate a motor vehicle, must be evaluated in total, as stated at paragraph 19 in the Andrea decision. However, I do not understand the decision in the case of R. v. Andrea to mean that it is inappropriate for the Court to individually assess each of the indicia stated by the peace officer

who issued the breath demand to determine whether such indicia is consistent with impairment. A peace officer is required to do the same thing. The corollary to the above quote from the Chartier case is that a peace officer is entitled only to rely upon that which he has good reason for believing to be reliable as an indicia of impairment. That type of analysis is necessary to ensure that in total the peace officer's observations amount to more than just a hunch or suspicion.

[8] The record should therefore reflect that my exercise of assessing each of the indicia of impairment was conducted to ensure that the stated subjective belief by the peace officer who issued the demand, when objectively assessed in total, met the requirement of a reasonable and probable grounds belief of impairment as prescribed in S.254(3). I see no reason to repeat or paraphrase here my assessment of the impairment indicia evidence which was conducted orally on October 5, 2006, thereby forming part of the record.

The Section 9 Charter Issue

[9] The evidence establishes that the Accused was initially detained by the police in relation to a complaint of possible domestic violence. The two RCM Police officers, Constables Corscadden and Slawter, separately responded to the complaint, proceeding to the Accused's residence at or near Lawrencetown, Halifax County. The evidence discloses that the Accused, while operating his vehicle on Highway 207, was observed by Constable Corscadden who followed the Accused to his residence over a short distance of less than two kilometers. There is nothing about the Accused's driving that was indicative of impairment.

[10] Constable Slawter had proceeded to the Accused's residence to speak with his spouse, being the person who had initiated the complaint. The Accused drove into his driveway and proceeded into his garage followed by Constable Corscadden. Constable Slawter was standing outside on the Accused's property at that time. Both police officers went into the garage and approached the Accused as he exited his vehicle. They had a brief conversation with him about why they were there, being the investigation of the complaint of possible domestic violence. Neither officer detected the smell of alcohol on the Accused's breath nor observed any indicia of

impairment during their conversation with him. Constable Corscadden directed the Accused to get into the backseat of her patrol vehicle while they investigated the domestic violence complaint further. During that further investigation of the domestic violence complaint, the Accused remained alone in the police patrol vehicle with all doors and windows closed. He was unable to leave the vehicle. There is no doubt that he was detained, however he was not formally arrested in respect of any offence prior to or at the time when he was directed into the backseat of Constable Corscadden's patrol vehicle.

[11] The detention of the Accused while the police further investigated the domestic violence complaint likely was consistent with the common-law power approved by the Supreme Court of Canada in R. v. Mann (2004) 185 C.C.C. (3d) 308. While the Accused was detained in the back of Constable Corscadden's patrol vehicle, Constable Slawter had a discussion with the Accused's spouse. During that discussion no information was received that would have given rise to a reasonable and probable grounds belief to arrest the Accused in respect of any criminal offence.

[12] In light of the responses received by Constable Slawter to his inquiries of the Accused's spouse, which were communicated to Constable Corscadden, Constable Corscadden went back to her patrol vehicle for the purpose of releasing the Accused. But for the smell of alcohol that she noticed when she opened the door to her patrol vehicle, I conclude that Constable Corscadden would have released the Accused. However, she concluded that the smell of alcohol, together with other evidence, about which she testified, was sufficient to give her a reasonable and probable grounds belief to arrest the Accused for impaired driving and issue the S.254(3) Code demand. That arrest brought an end to the initial investigative detention relative to the domestic violence complaint.

[13] The absence of reasonable and probable grounds for the arrest of the Accused, as I have previously found relative to the S.253 Code charges, leads me to conclude that his further detention, after the initial investigative detention had ended, was unjustified and therefore arbitrary. In support of that conclusion I have relied upon the meaning of arbitrary detention approved by the Ontario Court of Appeal in the case of R. v. Cayer (1998) 6 M.V.R. (2d) 1 where it was stated at page 13:

"Black's Law Dictionary (5th ed., 1979) gives the following definition of 'arbitrary' at p.96:

> "ARBITRARY. Means in an "arbitrary" manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic. Without fair, solid, and substantial cause; that is, without cause based upon the law; not governed by any fixed rules or standard. Orginarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be one performed without adequate determination of principle and not one founded in nature of things. [Authorities omitted.]

In our view, an arbitrary detention for the purpose of these appeals is a detention which is capricious, despotic, *or* unjustifiable."

[14] I have further relied upon the decision of the Supreme Court of Canada in the case of R. v. Storrey (1990) 53 C.C.C. (3d) 316. I refer in particular to the following quote at p.323 where Cory J. was commenting upon the authority to arrest without a warrant prescribed in S.495, formerly S.450:

> "Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the

police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 at p. 329 (C.A.), wherein Scott L.J. stated:

> The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest: see *R. v. Brown* (1987), 33 C.C.C. (3d) 54 at p.66, 76 N.S.R. (2d) 64 (C.A.); *Liversidge v. Anderson*, [1942] A.C. 206 at p.228 (H.L.).

In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view.

> That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest."

[15] The foregoing cited passages were approved in the thorough decision of Porter, J. in the case of R. v. Sekora (1992) 38 M.V.R. (2nd) 198 which dealt with issues similar to those raised in this matter before me, including the applicability of the case of R. v. Rilling (supra).

[16] I conclude that the arrest of the accused in respect of the S.253 Code charges and the S.254(3) demand was not based on anything other than suspicion and were therefore not justified. The accused's S.9 **Charter** rights were therefore violated.

The Section 8 Charter Issue

[17] The State, through the actions of the police, interfered with the Accused on August 26, 2005 by initially detaining him, thereafter arresting him and demanding that he provide samples of his breath, a demand he complied with which led to an analysis of his blood alcohol concentration.

[18] The first issue is whether the taking of a breath sample can constitute a seizure. In the case of R. v. Pavel (1989) 53 C.C.C. (3d), the Ontario Court of Appeal stated at p.310:

> "There can be no doubt that the demand for and *taking of breath and blood samples constitute interference with the liberty* of the subject and the taking of a blood sample is an interference of a very intrusive nature. *The state must, accordingly, comply strictly with the conditions set forth in the Code before any such interference is lawfully authorized and justified*.."(emphasis added)

[19] The Ontario Court of Appeal again considered the issue of whether a breath sample can constitute a seizure in the case of R. v. Wills (1992) 70 C.C.C. (3d) 529 where Doherty, J.A. stated at page 540:

> "Given the personal privacy interests which underlie s.8 of the Charter, I see no reason to differentiate between the taking of a person's breath and the taking of a person's blood or urine, in so far as the applicability of S.8 is concerned. The state capture, for investigative purposes, of the very breath one breathes constitutes a significant state intrusion into one's personal privacy. Section 8 concerns are clearly engaged by such conduct.
>
> In holding that the taking of a breath sample can constitute a seizure, I should not be taken as holding that it always amounts to a seizure. Not every taking by the state is a seizure. In *Dyment*, *supra*, at p.257, La Forest J. for the majority, wrote: "...the essence of a seizure under S.8 is the taking of a thing from a person by a public authority *without that person's consent*" (emphasis added)."

[20] Both of the foregoing cited passages are consistent with the following statement by La Forest, J. in the case of R. v. Dyment (1987) 45 C.C.C. (3d) 244 at page 257:

> "As I have attempted to indicate earlier, the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity."

[21] Based on the foregoing, I conclude that the taking of a breath sample can constitute a seizure. The next issue to be determined is whether the taking of the breath sample from the Accused was a seizure. A determination of that issue depends on whether the Accused, by choosing to comply with the demand rather than refusing, thereby consented to provide samples of his breath.

[22] In this matter before me, the Accused, due to the absence of a reasonable and probable grounds belief to arrest and issue a S.254(3) demand, had the right to refuse to comply with that demand. His acquiescence or compliance however is not to be equated with consent. As stated in R. v. Wills at page 541:

> "The danger to constitutionally protected individual rights implicit in the equating of consent with acquiescence or compliance is self-evident and does not require detailed elaboration. When the police rely on the consent of an individual as their authority for taking something, care must be taken to ensure that the consent was real. Otherwise, consent becomes an euphemism for failure to object or resist, and an inducement to the police to circumvent established limitations on their investigative powers by reliance on uninformed and sometimes situationally compelled acquiescence in or compliance with police requests: see Law Reform Commission of Canada, *Police Powers: Search and Seizure in Criminal Law Enforcement*, Working Paper 30 (1983), at pp.158-63."

[23] In order to be valid, consent must meet several stringent requirements and must amount to an informed and voluntary waiver of one's S.8 Charter rights. Among other things, the Accused must know of his right to refuse, and must appreciate the consequences of giving consent. Statutorily compelled choices, such as arise in relation to a S.254(3) demand are different than those which are non-statutorily compelled. The difference was recognized in the R. v. Wills decision and discussed at length regarding the issue of waiver at pp. 541-546 of that decision.

[24] As recognized in R. v. Wills, the onus is on the Crown to demonstrate that the Accused decided to relinquish his constitutional right with full knowledge of the existence of the right and appreciate the consequences of waiving that right. The Crown has not discharged that onus in this matter before me. The fact that the Accused had the benefit of consulting with

counsel for a short period of time before choosing to provide a sample of his breath for analysis, by itself, is not sufficient to constitute waiver. There is no evidence that the Accused was made aware of the indicia of impairment that was relied upon by the arresting officer for the issuance of the S.254(3) demand. Furthermore, there is no evidence that the same lawyer, prior to advising the accused, had a discussion with the arresting officer to determine the basis for the arrest and S.254(3) demand.

[25] I conclude that the decision of the Accused to provide a sample of his breath for analysis was neither based upon consent nor constituted a waiver of his S.8 constitutional right. I therefore conclude that the demand for the sample of the Accused's breath and the provision thereof without the requisite reasonable and probable grounds basis constituted a violation of the Accused's S.8 **Charter** rights. That demand and the provision thereof occurred while the Accused was unjustifiably, and thereby arbitrarily, detained in contravention of his S.9 **Charter** rights as I have found above. I will now turn to a consideration of whether the Certificate of Analysis should be excluded pursuant to the provisions of S.24(2) of the **Charter**.

The Section 24(2) Charter Issue

[26] Consideration of S.24(2) has been triggered by the foregoing findings that the Accused's S.8 and S.9 **Charter** rights were violated. That leads to an analysis of the evidence and circumstances of this matter in relation to three factors: trial fairness, seriousness of the breach, and the effect of exclusion which factors were first described in R. v. Collins (1987) 33 C.C.C. (3d) 1 (S.C.C.).

[27] The provision of one's breath for analysis by an approved instrument is clearly conscriptive evidence. The Accused was compelled by State agents to participate in the creation of evidence despite the lack of the requisite grounds to arrest and issue the S.254(3) demand.

[28] The Crown has not attempted to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative, non-conscriptive means. The Crown's submissions appear to acknowledge that the evidence could not have been discovered by alternative non-conscriptive means.

[29] As a general rule the Court will conclude that the admission of conscriptive evidence, undiscoverable by alternative non-conscriptive means, will render the trial unfair and thereby bring the administration of justice into disrepute (see R. v. Stillman (1997) 113 C.C.C. (3d) (S.C.C.)). That appears to have been the conclusion of the summary conviction appeal court in the case of R. v. Andrea, 223 N.S.R. (2d) 197 and in R. v. Soczynski (2006) (supra), being two cases where breath sample analysis evidence, obtained despite an absence of a reasonable and probable grounds basis for the S.254(3) demand, was excluded, without consideration of the second set of Collins factors. I also see no need to specifically consider the second set of Collins factors relative to the exclusion issue in light of the nature of the evidence sought to be excluded and the absence of any submission from the Crown that second set of factors are relevant to a consideration of the S.24(2) issue.

[30] However, before turning to a consideration of the third set of factors, it may be appropriate to comment on the second set of factors related to the seriousness of the breach. In this case they, like the first set of factors, reveal the **Charter** breaches to be more serious. The police in this case did not have a reasonable and probable grounds basis for the arrest or the

S.254(3) demand. I refer to the comments above by Cory J. in the case of R. V. Storrey (supra) relative to the importance of reasonable and probable grounds for arrest and statutorily compelled choices.

[31] This is a matter where I believe it ought to have been obvious to the police that there was only a basis for a S.254(2) screening demand. I suggest that the purpose and benefit of issuing a S.254(2) demand in situations where there is equivocal or less than equivocal indicia of impairment, is to introduce a measure of objectivity to the assessment of such indicia. The value of such an objective measure cannot be underestimated relative to the statutorily compelled choice that an accused is required to make in response to a S.254(3) demand and the potential consequences of making either choice. Where the screening device confirms the equivocal nature of the observed indicia, one would expect the approved screening device to register a pass or warn. In such cases, an accused will likely be spared an unnecessary arrest with its potential consequences. The police officer will also avoid devoting time unnecessarily to further investigate a matter likely to lead to no criminal charges. On the other hand, if the screening test results in a fail, the police officer will likely have clear, unequivocal

evidence to establish the necessary reasonable and probable grounds basis for arrest and issuance of the 254(3) demand.

[32] Neither officer had an approved screening device with them, however there was no evidence that a screening device could not have been made available to the Accused to meet the statutory imposed “forthwith” requirement.

[33] Turning finally to the third set of factors, I have considered that the offence of impaired driving is a serious matter, the deterrence of which is a matter of public interest. However, in this case, there was no evidence of erratic driving, death, injury or property damage arising from the operation of the Accused’s vehicle. I have concluded that the admission of the certificate of analyst, absent the existence of the requisite reasonable and probable grounds basis for the S.254(3) demand, would likely cause greater disrepute for the administration of justice than from its exclusion. I therefore conclude that the evidence of the analysis of alcohol from the accused’s breath should be excluded pursuant to the provisions of S.24(2) of the **Charter**.

[34] Having excluded the evidence of the breath analysis evidence, I find the evidence with respect to the S.253(b) charge insufficient to prove that charge beyond a reasonable doubt. I find the accused not guilty of the S.253(b) charge.

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R. Brian Gibson, J.P.C.
Associate Chief Judge