

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Peel, 2003NSPC66

Date: 20031001

Docket: 1182149, 1182150

Registry: Kentville

Between:

Her Majesty the Queen

v.

Douglas Colin Peel

Judge: The Honourable Judge Alan T. Tufts

Heard: May 15, 2003 at Kentville, Nova Scotia

(Oral) Decision: October 1, 2003

Charge: THAT on or about the 12th day of May, 2002, at, or near Aylesford, in the County of Kings, Province of Nova Scotia, did operate a motor vehicle 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 contrary to Section 253(b) of the Criminal Code.

AND FURTHER on or about the 12th day of May, 2002, at, or near Aylesford, County of Kings, Province of Nova Scotia, did operate 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: Lloyd Lombard, for the Crown
Robert Stewart, Q.C., for the Defendant

By the Court:

[1] This is the matter of R. v. Douglas Colin Peel. The defendant in this matter is charged under s. 253(a) and (b) of the **Criminal Code**. Particularly, it is alleged that he was driving a motor vehicle while his ability to do was impaired by alcohol and further that his blood alcohol content exceeded the so-called “legal limit.”

[2] The primary issue in this proceeding concerns the police action in stopping the defendant; whether his s. 9 rights were violated and whether the evidence obtained should be excluded. Also at issue is whether there is sufficient evidence to prove beyond a reasonable doubt that the defendant's ability to drive was impaired by alcohol.

[3] The events in question took place May 12, 2002 near Aylesford, Kings County, Nova Scotia at approximately 4:30 a.m. Constable Roach was on “regular” patrol in a marked police car at the time although he never gave any evidence as to what that actually entailed. As he was driving west on the No. 1 Highway he saw a vehicle coming from the north on a side road which intersected Highway No. 1 at a stop sign. There was nothing peculiar about the vehicle or its movements. In fact, the officer only saw the headlights of the car as it was still dark. He testified that, “My idea was to follow the vehicle.” There was no evidence he was conducting any particular investigation or patrolling for possible motor vehicle violations. After seeing the vehicle he made a U-turn and came back to the intersection. It is clear he was waiting for the vehicle to approach the stop sign after which he intended to follow it - for what reason is not clear. He never gave any evidence to explain why he wanted to follow this particular motorist.

[4] As he approached the intersection and looked up the side road he noticed the vehicle entering a driveway. The evidence does not disclose whether the subject vehicle turned left or right into the driveway. The driveway was approximately fifty to one hundred metres from the intersection. Constable Roach then proceeded up the side road slowly to “check the vehicle out.” He saw the defendant exit the driver's side and another passenger exit the opposite side of the vehicle. He then noticed the defendant going across the yard in a southerly direction “half jogging,” to use the officer's words. From the evidence it appears the defendant was going to the neighbouring house, although the demarcation lines between the various properties was not clear. Constable Roach thought the defendant's actions in turning into the driveway before the stop sign, exiting the vehicle and his half-jogging across the yard indicated the defendant was trying to avoid the officer.

However, the officer never engaged his emergency equipment or signalled the defendant to stop at any time and in particular did neither while either vehicle was on the public highway.

[5] After seeing the defendant exit the vehicle Constable Roach left his police car and yelled to the defendant “license, registration and insurance.” The defendant stopped and the constable noted some signs that the defendant had been consuming alcohol. He noted a smell of alcohol, bloodshot eyes and flushed face. He said he was a little unsteady on his feet. He said he was in “party mode”. The defendant was subsequently dealt with as a suspected impaired driver and gave breath samples pursuant to a breath demand.

[6] The defence argues - No. 1, that Constable Roach did not have reasonable and probable grounds to arrest the defendant and to give a breath demand. The defence relies on **R. v. Landry**, a December 20, 2002 decision of the Nova Scotia Supreme Court, and No. 2, that the defendant was arbitrarily stopped by Constable Roach thereby breaching his s. 9 **Charter** rights and any evidence with respect to the results of the breath tests should be excluded, according to the defence's argument.

[7] I will deal with the second issue first. In analysing this issue I have referred particularly to the following cases: **R. v. Ladouceur** (1990) 56 C.C.C. (3d) 22, S.C.C. ; **R. v. Wilson** 56 C.C.C. (3d) 142 S.C.C. ; **R. v. MacLennan** 138 N.S.R. (2d) 369, N.S.C.A. **R. v. Grant** [2001] N.S.J. No. 164; **R. v. Caissie** (1999) 138 C.C.C. (3d) 205 (NBCA) and finally, this Court's decision in **R. v. Eldridge**, 1999 Carswell NS 467. I have also reviewed the other cases referred to me by counsel and which are contained in their respective briefs which I can list if necessary. I have also reviewed the following article by Wayne Gorman, now The Honourable Wayne Gorman of the Newfoundland Provincial Court. The article is called, Arbitrary Detention and Random Stop. It is reported or published at 41 Criminal Law Quarterly, p. 41.

[8] Here, in my opinion, Constable Roach had no cause or reason to pursue the defendant's vehicle. There is no evidence as to why he wanted to “follow” the vehicle or to check it out. He never testified that he was doing **Motor Vehicle Act** “stops” or enforcement. While he exclaimed to the defendant, “license, registration and insurance” after he saw the defendant on the lawn this does not persuade me that he was enforcing the provisions of the **Motor Vehicle Act** when

he made the U-turn on the highway to follow the defendant and subsequently detained him.

[9] In any event Constable Roach never directed or signalled the defendant to stop while on the public highway. He was never in pursuit of the defendant while the defendant's vehicle was on the public highway. There is not sufficient evidence to conclude that the defendant was trying to avoid Constable Roach, in my opinion.

[10] **R. v. Grant**, *supra*, can be distinguished, as in that case the officer signalled the defendant to stop and his failure to do so was a possible infraction under the **Motor Vehicle Act**, which the police were justified in entering his driveway to pursue. However I cannot agree that a private driveway is a highway for the purposes of the **Motor Vehicle Act**. That is, the officer cannot in a private driveway be enforcing the **Motor Vehicle Act** provisions, which is at issue here. This is distinct from whether the police can enter, lawfully, a private driveway, which was the issue in the **Evans** case which was referred to in the **Grant** decision. The defendant here was not on a public highway when he was stopped. In fact, there was some evidence as to who lived in the house in which the driveway in which the defendant entered, a Mrs. Strum. There is nothing to suggest that the defendant was not in good faith going to this residence or the neighbouring one or that the other passenger did not have some connection to either residence.

[11] Furthermore, the constable did not stop the defendant on a public highway as I indicated. The analysis which this court employed in **R. v. Eldridge** applies here. I need not repeat it again, it is well set out and for the sake of brevity I do not intend to repeat it again here. Accordingly, the decisions in **R. v. MacLennan** and **R. v. Ladouceur**, do not directly apply to this case.

[12] When Constable Roach stopped the defendant on the lawn it was without cause or reason. I do not accept that the defendant was trying to avoid the police as it is not clear he saw the police car previously. The police officer was not in hot pursuit. The police officer did not have the emergency equipment on or were not otherwise directing the defendant to pull his vehicle over. Constable Roach stopped and detained the defendant on private property arbitrarily. He had no reasonable grounds or suspicion for that matter to do so. There was no articulable cause. The defendant's s. 9 rights, in my opinion, against arbitrary detention were breached. The subsequent breath samples were acquired as a result of this violation.

[13] The issue then becomes whether that evidence should be excluded. The law on this subject was recently and extensively reviewed by the Supreme Court of

Canada in **R. v. Buhay** [2003] 1 S.C.R. 631. The breath samples here were conscripted evidence and accordingly this affects the issue of trial fairness. The violation was serious in my opinion in that the officer cannot be said to be acting in good faith. The police conduct was a flagrant breach, as that term is interpreted in the authorities, given the circumstances. The administration of justice would be brought into disrepute, in my opinion, if the evidence was included, as opposed to being excluded, notwithstanding it is critical to the Crown's case on this particular count. The breath samples are accordingly excluded.

[14] I will now deal with the other indicia of impairment connoted by Constable Roach. I have considered the test prescribed in **R. v. Stellato** (1993) 78 C.C.C. (3d) 380 and **R. v. Andrews (1996)**, 104 C.C.C. (3d) 392. I am not convinced beyond a reasonable doubt that the defendant's ability to drive a motor vehicle was impaired by alcohol or more particularly that the Crown has proven such beyond a reasonable doubt. Accordingly it is not necessary for me to determine if the observations of the defendant made by Constable Roach after he detained the defendant in violation of his s. 9 rights should be excluded, given this conclusion. Equally, it is not necessary for me to consider the defence's first issue as to whether the officer had sufficient grounds to arrest the defendant, the issue raised in **R. v. Landry** [1986] 1 S.C.R. 145.

[15] Accordingly, the defendant is found not guilty on the charge under s. 253(b) given the exclusion of the evidence and because I have a reasonable doubt that his ability to drive a motor vehicle was impaired he is also found not guilty under s. 253(a).

ALAN T. TUFTS, J.P.C.