IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Farrell, 2008 NSSC 119

Date: (20080228)
Docket: 283326
Registry: Antigonish

Between:

Her Majesty the Queen

Appellant

v.

Della Marie Farrell

Respondent

Judge:	The Honourable Justice J. Edward Scanlan
Heard:	February 28th, 2008, in Antigonish, Nova Scotia
Written Decision:	April 21, 2008
Counsel:	Ronald J. MacDonald, Q.C., for the appellant Stanley W. MacDonald, Q.C. for the respondent

By the Court:

[1] This is an appeal in relation to an aquittal. There was an oral decision rendered June 14th, 2007, I believe, and a written decision June 28th, 2007, wherein the Provincial Court acquitted Della Marie Farrell. I should not say acquitted, he excluded the evidence of the blood sample obtained under the demand for blood sample. It related to a motor vehicle accident that occurred on April 23rd, 2006.

[2] The Learned Trial Judge dealt first with the issue as to whether or not there was reasonable and probable grounds to make a demand. He indicated at paragraph three of his decision that:

> "Upon arrival at the accident scene, Const. Harris was confronted with the following:
>
> (i) the accused was trapped in her van after she apparently went off the road into a ditch;
>
> (ii) markings on the road which suggested to the constable that the accused went off the road when she failed to negotiate a turn because of excessive speed;
>
> (iii) while the paramedics were removing the accused from her vehicle, one of them gave him a nod, which he understood from previous experience with them that alcohol was involved;

> (iv) comments by the accused's nephew, who arrived on the scene after him, that his aunt was on her way to pick up his daughter to take her to church and that she had a history of drinking and driving;
>
> (v) a smell of alcohol from the accused's breath after she was removed from her vehicle, which became stronger in the ambulance when Const. Harris accompanied her to the hospital; and
>
> (vi) the accused was complaining of back and hip pain."

I am not sure how the complaint of back and hip pain gave rise to reasonable and probable grounds, but that was one of the facts that the Judge said confronted the officer and I think it is relevant in terms of how he dealt with this case.

[3] The officer according to Judge Stroud and I am now referring to paragraph 16 of the decision where Judge Stroud says:

> "[16] Const. Harris based his grounds for giving the blood demand on his opinion that it was impracticable to obtain a breath sample. He stated that at the time he gave the demand he was conscious of the fact that, what he believed to be a two hour time limit under s. 254(3), was approaching. However, he had already made the decision to obtain a blood sample shortly after he arrived at the accident scene and made no attempts to comply with the requirements of s. 253(3)(b)(i) or (ii). In my view, his failure to do so resulted in an unconstitutional search and seizure and a breach of s. 8 of the **Charter**."

[4] In this case I am satisfied that the officer, while he may well have considered and formed the opinion at the scene of the accident that this was going to be a blood sample case, may well have changed his mind at any point in time from there on in. I refer to page 132 of the transcript where he was asked:

> "**Q.** And in fact, you already knew in the ambulance anyway that you were going to ask for a blood sample.
>
> **A.** Yes, that was my ... to the best of my knowledge, I was going to do that, yes, given the suspected injuries and whatnot."

It may well be that as the officer viewed the situation, where the accused was in the ditch upside down, hanging by her seatbelt I guess, and had to be extricated with the jaws of life and placed on a backboard with her body immobilized, as he looked at that case he may well have been of the opinion that this is going to be a blood test case as opposed to a breath sample case. But I am satisfied that it would be wrong for the Judge to simply say that because he formed that opinion early on that the officer could not then go on to make a determination at the time that the demand was given that in fact both subjective and objective grounds existed for making a blood demand.

[5] In this case what the officer was faced with was a situation where he had been in the hospital for some time after the ambulance ride and he had some evidence as regards to the time he thought the accident had occurred. I referred in the **MacFadden** case to the fact that we would not expect officers to be hauling people out of ambulances or off backboards in this case or out of emergency rooms off to give a breath sample. The officer was entitled at the time that he gave the demand to assess the evidence that was before him at the time of the demand and that I am satisfied is the important moment in time. The Court must look at the provisions in the **Criminal Code** and say did the officer at that point in time have the subjective grounds to form a subjective basis for giving the demand. In this case it turned on the issue as to whether or not it would be impracticable for her to give a breath sample.

[6] For the Trial Judge to have focused on the fact that the officer made up his mind or formulated an opinion that he suspected that he was looking at a blood sample case as opposed to a breathalyzer sample case is wrong. The Trial Judge should have asked himself the question as to whether or not the officer in fact had a proper basis to make the demand at the time the demand was given.

[7] There are very substantial distinctions between the **MacFadden** case and this, the **Farrell** case. In the **MacFadden** case there was nothing in the conversation that occurs between the officers and the nurse as to what the injuries might be or even when the person might be assessed. In this case we had Ms. Farrell herself complaining of back injuries, hip pain, back pain. That is what the officer heard, he heard those complaints. She was very forceful, it would appear from the transcript, in terms of her complaints making it clear that she thought she had some serious injuries.

[8] The officer was asked about bringing the breathalyzer machine into the hospital. He explained the impracticality of that. As I indicated I am satisfied there is an error for the Trial Judge in this case to have focused on the issue as to whether or not the officer decided earlier on there was likely going to be a blood test versus a breath test. Even the officer himself when he was giving his evidence said that:

> "... to the best of my knowledge, I was going to do that, yes, given the suspected injuries and whatnot."

I am satisfied that, as I said, the Trial Judge should not have stopped at asking as to whether or not the officer made up his mind earlier.

[9] In the **MacFadden** case there were no apparent physical injuries. In this one here, this accident, there were apparent physical injuries or at least complaints of injuries. I noted in the **MacFadden** case, and I note it again, that if there were obvious physical injuries, in some cases even without a medical opinion, an officer making a demand would be able to on reasonable and probable grounds believe that by reason of physical condition a person might not be able to provide a breath sample. That does not mean the person has to have injuries to their face or their mouth. There was a lot of time spent on that and obviously Ms. Farrell did not have any injuries to her face or her mouth. Her injuries, or at least her complaints, were of her back and her hip. Those injuries meant that she could not leave the hospital. The doctor was asked about the treatment and said that it was going to be a while. The officer knew from experience that when he said it was going to be a while, and you had to get x-ray technicians in, that meant it was not going to be in the reasonably near future. I am satisfied that as noted in the **Wytiuk** case, as cited in the Crown's brief, that the two hour time limit is something that the officer would be entitled to consider. That does not mean, as pointed out by Mr. Stan

MacDonald for the respondent, that the samples of the blood test could not be introduced, if obtained, at a later time. The officer was conscious of the benefits of having the blood taken within the two hours and that is why he thought, I have to make up my mind, is she in a position where she can be given the demand and go on from there. The question at that time for the officer is it formed the reasonable and probable grounds for giving the demand. I am satisfied that on reasonable grounds that she cannot give a breath test because she is stuck here in the hospital and I have given the blood demand. I am satisfied that was appropriate.

[10] As regards to the issues in terms of the Notice of Contention, I accept the Crown's submissions that really those are better left for the Trial Judge because they are fact based and dependant on the findings of fact and I do not think that it is appropriate for this Court to read a transcript alone and make findings of fact.

[11] The same I might say, Mr. MacDonald, in terms of your suggestion that the Judge found that the witness was not credible. I did not see that in the decision, did not understand the Trial Judge to be saying that the officer was not credible. When he talked about whether or not it was going to be two hours on direct or

going to be a while, I did not see a specific reference to saying that he found the officer was not credible.

[12] I simply say this is a matter that should be remitted to the trial court for another trial. The appeal is granted.

J.

04/17/08