

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. MacLean, 2008 NSSC 159

Date: 20080527

Docket: SN 286884

Registry: Sydney

Between:

Dale Robert MacLean

Appellant

v.

Her Majesty the Queen

Respondent

Judge:

The Honourable Justice Frank Edwards

Heard:

May 2, 2008

Counsel:

William Burchell, Esq., for the Appellant
Robin Archibald, Esq., for the Respondent

By the Court:

[1] *Facts:* At approximately 1:45 a.m. on November 11, 2006, Constable McKenna of the RCMP was engaged in a traffic stop of another motor vehicle on Highway 19 at Strathlorne. His patrol car was stopped with its emergency lights flashing. The officer was preparing a warning ticket when he observed the headlights of a motor vehicle coming around a bend in the road north of his location. As the vehicle came fully into the officer's sight, it slowed down, made a turn into a parking lot, turned, came back on the highway and headed in the opposite direction. Constable McKenna re-entered his patrol car, turned and pursued the other vehicle. The constable was suspicious because it seemed this vehicle was trying to avoid him. Constable McKenna acknowledged that no laws had been broken by the manner in which the vehicle was being operated. He said he had a hunch based on his previous experience and he acted on that experience.

[2] Constable McKenna stopped the vehicle at approximately 1:50 a.m.. He recognized the driver and the driver was the Appellant.

[3] A series of observations and events followed during which the officer read a

roadside screening device demand to the Appellant. The result was a fail and Constable McKenna arrested the Appellant for impaired driving.

[4] Constable McKenna read the following to the Appellant:

“You have the right to retain and instruct a lawyer without delay. You also have the right to free and immediate legal advice by calling, toll-free, 1-866-638-4889 during business hours or 1-800-300-7772 during non-business hours.”

[5] Constable McKenna asked the Appellant, “Do you wish to call a lawyer now?” The Appellant responded, “I’m not sure. Maybe I should.”

[6] The constable says he took that to mean that the Appellant wished to call a lawyer. Constable McKenna then went on and read the following to the Appellant from his card:

“You also have the right to apply to Nova Scotia Legal Aid for free legal representation if you are charged with an offence.”

[7] The Appellant was asked if he understood and he said “yes”. Constable McKenna read the police warning and a breath demand under section 254(3) to the Appellant, both of which the Appellant said he understood.

[8] After some steps were taken pertaining to the Appellant's vehicle, Constable McKenna drove the Appellant to the RCMP detachment in his patrol car. At the detachment, the officer asked the Appellant if he wished to speak to a lawyer and the Appellant said "yes". The Appellant said nothing else on the subject of counsel or contacting counsel. He expressed no preference for any lawyer and did not ask that any particular lawyer be contacted.

[9] Constable McKenna called duty counsel by dialling the after-hours number on his card. He spoke to duty counsel whom he identified as Cathy Briand. The officer gave counsel a brief outline of the relevant circumstances and passed the phone to the Appellant. Constable McKenna left the room, closed the door and gave the Appellant privacy. The Appellant spoke to duty counsel for 24 minutes.

[10] The constable could observe the Appellant through a window in the door and he periodically checked on the Appellant to see if he was off the phone. On one of those checks, the officer observed that the Appellant was off the phone.

[11] Constable McKenna, who was a qualified technician, then administered the breath tests using a DataMaster C and the Appellant provided samples of his breath.

[12] Constable McKenna acknowledged that the Appellant, in these circumstances, has the right to call any lawyer he wishes. Constable McKenna agreed that he did not specifically tell the Appellant that he had the right to a lawyer of his choice using those words. He also agreed that he did not provide the Appellant with a telephone book.

[13] ***Grounds of Appeal:*** #1) **The Learned Trial Judge erred in law by finding that the stopping of the Appellant and taking him back to the police vehicle did not infringe the Appellant's rights under section 9 of the Charter, and #2) The Learned Trial Judge erred in law by finding that the Appellant had been properly informed of his right to retain and instruct counsel of choice.**

[14] ***Discussion: Ground of Appeal #1:*** **The Learned Trial Judge erred in law by finding that the stopping of the Appellant and taking him back to the**

police vehicle did not infringe the Appellant's rights under section 9 of the Charter.

[15] In discussing the Appellant's claim that he had been arbitrarily detained contrary to Section 9 of the Charter, the learned provincial court judge considered

R. v. Wilson [1990] 1 SCR 1291. He concluded:

“Based on the authority of *Wilson*, I would also say that the stopping of the Appellant was not random. In *Wilson*, the police officer had no reason to believe the driver was doing anything unlawful. He stopped the vehicle there because it was a block away from the hotel, the hotel bars had just closed, there were three men in the front seat, the vehicle had out-of-province license plates and he did not recognize the vehicle or the occupants (p. 3-4 of *Wilson*)

Justice Cory for himself and four other Justices, said that these facts might not be grounds for stopping a vehicle in Edmonton or Toronto but could be considered in a rural community. Where the police can offer grounds for a stop that are reasonable and can be clearly expressed, the stop is not random. (p. 5 of *Wilson*).

The explanation of Constable McKenna here is just as valid as that advanced in *Wilson*.”

[16] I agree. This was not a random stop. In the circumstances, the constable had ample reason to be suspicious. Unlike *Wilson*, where the police officer had no reason to believe the driver was doing anything wrongful, Constable McKenna

could easily suspect otherwise. The constable had the right, if not the duty, to proceed as he did. I would dismiss the first ground of appeal.

[17] ***Ground of Appeal #2: The Learned Trial Judge erred in law by finding that the Appellant had been properly informed of his right to retain and instruct counsel of choice.***

[18] Our Court of Appeal has conclusively decided this issue in ***R. v. Grouse***, (2004) NSCA 108. I am bound by that decision. Police in Nova Scotia are not obliged to specifically advise an accused that he has the right to contact counsel “of his choice” Therefore, I dismiss the second ground of appeal.

[19] The appeal is dismissed and the decision of Judge Embree is confirmed.

Order accordingly,

J.