IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Denton, 2004 NSSC 220

Date: (20041029)
Docket: S.AR. 211782
Registry: Annapolis

Between:

Harley Denton

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	The parties agreed that the appeal would be heard by way of written submissions only. Last submissions filed in April, 2004.
Written Decision:	October 29, 2004
Counsel:	Lance Scaravelli, for the Appellant David E. Acker, for the Respondent

By the Court:

INTRODUCTION:

[1] Constable Loppie of the R.C.M.P., as a result of an anonymous call and after observing a vehicle which appeared to be driving erratically, stopped the vehicle. Harley Denton was the driver and sole occupant of the vehicle. After making further observations of Mr. Denton, Constable Loppie requested Mr. Denton take a breathalyzer test. Mr. Denton refused and he was later convicted of refusal. Mr. Denton now appeals his conviction on the ground that the police officer did not have reasonable and probable grounds to make the demand and that the trial judge misdirected himself in that regard.

FACTUAL BACKGROUND:

[2] Mr. Denton left North Sydney, N. S. Between 10:30 and 11:00 a.m. on the morning of October 29, 2002. He was headed for Little River, Digby County. Mr. Denton admitted during his testimony that he had several drinks of rum the night before, at least four doubles. He testified that he had overslept and that he left his North Sydney hotel without taking time to shower or anything. He denied drinking while on the road later that day;

however, partially consumed bottles of alcohol were found in the bags in Mr. Denton's truck.

[3] Mr. Denton was driving a half ton truck towing a utility trailer on which was his garden tractor and plow. At about 4:00 p.m. that day, Constable Loppie of the Bridgetown R.C.M.P., through his dispatcher, received an anonymous telephone call that Mr. Denton was driving impaired on his way to Digby. The information was that Mr. Denton was operating a truck, possibly towing a trailer.

[4] Constable Loppie immediately headed out onto the 101 Highway where he soon came upon the Denton vehicle, which matched the description he had received. He observed the trailer swerving and crossing the yellow centre line of the highway and the white line which marks the shoulder of the travelled portion of the road. Constable Loppie stopped the vehicle and approached Mr. Denton who was still in his vehicle. He detected a strong smell of alcohol coming from Mr. Denton's breath. The Constable advised Mr. Denton he was under arrest for impaired driving and asked him to accompany the officer to the police vehicle. On the way to the police vehicle Mr. Denton was unsteady and staggering while walking on the flat surface with no apparent impediment. Shortly after stopping Mr. Denton

and after making the observations first mentioned, Constable Loppie made a demand for a sample of his breath for breathalyzer purposes. Mr. Denton testified he understood the demand and he refused on more than one occasion. It is not known if Constable Loppie had an approved screening device with him; however, Constable Loppie testified he formed the opinion he had enough grounds to go directly to a breathalyzer demand. Constable Loppie testified that Mr. Denton was intoxicated when he stopped him and that he was still impaired and unable to drive by the time they left the Middleton Police Station.

[5] Mr. Denton testified that the trailer he was towing was swerving because he had not placed the tractor in the best position on the trailer and because it was not equipped with sway bars. He also explained his staggering and unsteadiness as resulting from a fall down some stairs a week prior to October 29th , compounded by a plantar wart on one foot. Mr. Denton testified that he was aware Constable Loppie, on the basis of his observations, formed the opinion that Mr. Denton was driving while impaired; however, he did not make any of the alleged explanations to the officer.

[6] The trial judge found that Constable Loppie had sufficient indices of impairment to amount to reasonable and probable grounds to make a breathalyzer demand of Mr. Denton. As a result, Mr. Denton was convicted of the offence of refusal but he was found not guilty of impaired driving.

GROUNDS OF APPEAL:

[7] Mr. Denton now appeals his conviction on the following ground: That the trial judge erred in law by misdirecting himself with respect to reasonable and probable grounds to make a demand, as provided by section 254 (3) of the *Criminal Code of Canada*, for a sample of Mr. Denton's breath.

THE LAW:

[8] Section 254 (3) of the *Criminal Code*:

> Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under Section 253, the peace officer may, by demand made to the a person forthwith or as soon as practicable, require that person to provide then or as soon there after as is practicable
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> > (a) such samples of the person's breath as in the opinion of a qualified technician, . . .
>
> are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

[9] Mr. Denton relies heavily on the case of **R**. v. **Andrea**, S.C.N.S. #197447(A), a decision of Chief Justice Kennedy, and the authorities cited by the Chief Justice in that case. The appellant cited the following passages from **R.** v. **Bernshaw** and **R.** v. **Huddle**:

> In **R. v. Bernshaw**, 201, 95 C.C.C. (3d) 193, S.C.C., the Court held: Under s. 253(3), a peace officer must subjectively have an honest belief that the suspect committed the offence and objectively there must be reasonable grounds for the belief.
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> In **R. v. Huddle**, (1989) 21 M.V.R. (2d) 150 (Alta. C.A.), the Court held:
> It is an error in law to test individual pieces of evidence that are offered to establish the existence of reasonable and probable grounds. The question is whether, on an objective standard, the totality of the evidence provided reasonable and probable grounds.

[10] Chief Justice Kennedy, in **Andrea** supra, cites both of these authorities with approval. He also cites with approval, the following passage from Edwards J. in **R.** V. **Musgrave** (1996), 151 N.S.R. (2d) 29, when considering the objective test:

> "Whether a reasonable person having the means of knowledge available to the constable at the time might come to the conclusion that the appellant's ability to operate the motor vehicle was probably impaired by alcohol, requires a reasonable person."

[11] With regard to the test for reasonable and probable grounds, the crown cites the following authorities in its factum:

1. **Regina v. McClelland** 98 CCC (3d) 509 alt C.A. at p. 517

   It is clear from these cases that the question of the existence of reasonable and probable grounds must be based on facts known by or available to the police officer at the time he formed the requisite belief. I accept that the police officer's understanding of the facts must be a reasonable one. To paraphrase the statements in the cases cited, does the totality of the evidence available to the police officer at the time he formed the belief support an objective finding that he had reasonable and probable grounds to believe that the ability of the driver was impaired by alcohol? It is neither necessary nor desirable to hold an impaired driving trial as a threshold exercise in determining whether the officer's belief was reasonable.

2. **Her Majesty The Queen v. Russell James Musgrave**, NSSC, Edward J. at p. 3 states:

   "In the present case, the test may be expressed as follows: whether a reasonable person having the means and knowledge available to the Constable at the time might come to the conclusion that the Appellant's ability to operate a motor vehicle was probably impaired by alcohol.

3. **Her Majesty The Queen v. Trask** (1989) 81 NSR (2d) 576 (NSCA)

   "The question of belief based on reasonable and probable grounds involved primarily questions of fact. The test is an objective one. . . it may be expressed as being what a reasonable man having the means of knowledge available to Constable Body at the time might come to the conclusion that the Appellant probably had been drinking . . . Such a belief does not have to be established as correct. Indeed it may turn out to be wrong.

[12] In my opinion, there is no appreciable difference between the position of Mr. Denton and the Crown with respect to the Law and the test on the issue of reasonable and probable grounds to make a breathalyzer demand. It is the application of that Law in the circumstances of the present case which is in dispute.

[13] Of primary importance in the present case is the standard of appellate review as was referred to by Chief Justice Kennedy at pages 4 and 5 of **R.** v. **Andrea**, supra:

> As to the proper function of this court on summary conviction appeal, the standard of review was set out by Justice Cromwell of the Court of Appeal in **R.** v. **Nickerson**. I have the citation, 1991 N.S.J. 210 Nova Scotia Court of Appeal. This is Justice Cromwell speaking:
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> Absent an error of law or a miscarriage of justice, the test to be applied by the summary conviction appeal court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence.
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> As stated by the Supreme Court of Canada in **R.** v. **Barnes**, [1994] 1 S.C.R. 656 at page 657:
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> The appeal court is entitled to review the evidence at trial, re-examine and re-weigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the summary conviction appeal court is not entitled to substitute its view of the evidence for that of the trial judge.

> In Supreme Court of Canada in **R.** v. **Yebes?**, [1987] 2 S.C.R. 168 at page 185, I quote:
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> The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury acting judically could reasonaby have rendered. While the Court of Appeal must not merely substitute its view for that of the jury in order to apply the test, the Court must re-examine, and to some extent re-weigh and consider the effect of the evidence.
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> So you can re-examine and re-weigh, you cannot substitute your view for that of the trial judge.

In the **Andrea** case, the officer had only a "light odour of alcohol" and some possible minor driving infractions. In the present case the officer had a "strong smell of alcohol" emanating from Mr. Denton's breath, an anonymous report of possible impaired driving, apparent erratic driving, staggering while going to police vehicle, all unexplained to Constable Loppie. Without any purported explanations from Mr. Denton, who was well aware of the officers opinion, was Constable Loppie required to do more in the circumstances? I find that he was not.

[14] Considering the standard of appellate review, I find that the trial judge had ample evidence before him to conclude that Constable Loppie had reasonable and probable grounds to make a breathalyzer demand of Mr. Denton. The trial judge, in his decision, clearly considered the tests on the issue of reasonable and probable grounds, including any possible

explanations for Mr. Denton's behavior, and I find that he did not misdirect himself in that regard. Quite the contrary, he considered all aspects of the test. The Trial Judge did not commit any errors of law in reaching his conclusions and his verdict is reasonably supported by the totality of the evidence.

[15] Therefore, the appeal is dismissed.

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Boudreau J.