

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Peters*, 2017 NSSC 132

Date: 2017-05-19

Docket: CRD No. 452629

Registry: Digby

Between:

Her Majesty the Queen

v.

Eldon Donald Peters

Judge: The Honourable Justice Pierre L. Muisse

Heard: May 2 and 3, 2017, in Digby, Nova Scotia

Counsel: Darren MacLeod, for the Accused (Applicant)
Hugh Robichaud and his Associate Dildeep Singh Bhatti,
for the Crown (Respondent)

INTRODUCTION

[1] On September 5, 2015, numerous police officers were positioned on Water Street in Digby to maintain the peace during the Wharf Rat Rally. They observed the Accused, Eldon Donald Peters exit Club 98 and walk behind a group of bikers. While following them, he was making gestures with his hands at waist level. Constable Jared Daley interpreted them as indicating Mr. Peters wanted to start a fight.

[2] When the biker at the rear turned around and walked aggressively towards Mr. Peters, followed by other members of the group, the police officers intervened. Constable Daley went directly to Mr. Peters. When he got close enough to touch Mr. Peters, he smelled alcohol on his breath, and immediately arrested him for being intoxicated in a public place. The remaining officers intercepted the bikers.

[3] Mr. Peters was brought across the street, into the back of the police van that was parked there, and turned over to Constable James Klyszejko, who was tasked with transporting arrested persons to the holding cells.

[4] In the booking area at cells, while preparing to lodge Mr. Peters, Constable Klyszejko conducted a pat-down search on him. He discovered a plastic baggie

containing 15 small vials of white powder tucked in Mr. Peters' right sock. He seized the vials of powder and Mr. Peters' cell phone.

[5] Mr. Peters is now facing charges of possession of cocaine for the purposes of trafficking. He brought the within application to exclude those items from evidence based on a breach of his right under Section 8 of the *Canadian Charter of Rights and Freedoms* "to be secure against unreasonable search or seizure".

[6] The parties have agreed that if the arrest and taking into custody were lawful, then the search was properly incidental to those actions. They have also agreed that the manner of arrest, as well as the manner of search and seizure are not an issue.

[7] In addition, they have asked for a decision on the lawfulness of the arrest and taking into custody, prior to making written submissions regarding whether the evidence in question should be excluded under Section 24(2) of the *Charter*.

ISSUE

[8] Therefore, the only issue to be determined at this stage is whether the police officers had the requisite grounds to arrest Mr. Peters and take him into custody.

[9] If not, the arrest and taking into custody were unlawful and in violation of Section 9 of the *Charter*.

LAW AND ANALYSIS

[10] The parties agree that the legislative provisions which are relevant to the arrest and taking into custody of Mr. Peters are Sections 111(1) and 87(2) of the *Liquor Control Act*, R.S.N.S. 1989, c. 260 (the “*LCA*”). They also agree that, to the extent that the arrest powers under Section 495 of the *Criminal Code* may be applicable, it would not change the requisite grounds in any event. Therefore, I will determine whether, in the circumstances of the case at hand, the arrest and taking into custody were authorized by these sections of the *LCA*.

[11] Mr. Peters was arrested and taken into custody for being intoxicated in a public place contrary to Section 87(1) of the *LCA*. Therefore, determining the proper definition of “intoxicated”, for the purposes of Section 87(1), is essential assessing whether the police had the requisite grounds.

DEFINITION OF “INTOXICATED”

[12] The general principle emanating from the applicable jurisprudence is that the effects of alcohol must be substantial to meet the definition of “intoxicated” for the purposes of the offence of being intoxicated in public. For instance, even if those effects are sufficient for a finding of impaired operation of a motor vehicle, they

may not be sufficient to constitute intoxication in public under Section 87 of the *LCA*.

[13] Most cases have required an extremely high level of impairment. The Court in *R. v. Hofmeister*, 2008 NSPC 46, cited multiple articulations of the requisite level of impairment from various decisions. They include the following:

- (a) That a person has become so “stupefied by liquor” that he has “lost the *capacity* ... to prevent himself from causing ‘injury to himself or be a danger, nuisance or disturbance to others’”.
- (b) “Extreme conditions of alcohol impairment” existed.
- (c) “A person is unable to take care of him or herself or is a danger to other persons.”

[14] The Court in *R. v. Lively*, 2007 NSSC 301, at paragraphs 41 to 43, approved of, and applied, the approach that, if a person has sufficient capacity that “he is unlikely to cause injury to himself or be a danger, nuisance or a disturbance to others”, he does not meet the definition of intoxicated under the *LCA*.

[15] The Court in *R v. Guray*, 2015 BCCA 183, at paragraph 23, found that there were sufficient grounds for arrest because it was objectively reasonable for the arresting officer to conclude that the accused “was sufficiently intoxicated that he was incapable of looking after himself”.

[16] In contrast, the Court in *R. v. Baptist*, 2008 NSSC 138, at paragraphs 19 and 26, was not prepared to conclude that Section 87(2) of the *LCA* required the “demanding” assessments of intoxication articulated in *Foster v. Morton*, 1956 CanLII 343 (N.S.C.A.) and *R. v. Legrandeur*, 2004 BCPC 489. Those articulations were, respectively: “being stupefied or disordered in intellect with alcoholic liquor”; and, “being stupefied or drunk from the consumption of alcohol ... to such a marked degree ... that the person is a danger to himself or others or is causing a disturbance”.

[17] The Court in *Baptist* did not explain why it was not prepared to reach that conclusion other than to state that there was no compelling reason to do so. It is also noteworthy that, in that case, there was clear evidence that the accused was out of control before and during his arrest, and while in the holding cell area; and, thus, would likely have met that more “demanding” definition. Consequently, the Court’s comments were not essential to its decision. For these reasons, I do not find the case to be a persuasive authority for a less “demanding” definition of intoxication.

[18] The Court in *R. v. Venton*, 2000 YTTC 60, also refused to interpret Section 87 of the Yukon *Liquor Act* as requiring that a person be “likely to cause injury to themselves or others, or be a nuisance or disturbance to others” before they can be

taken into custody. Unfortunately, the Court did not provide an alternate definition of “intoxicated”. It simply stated that the officer need only have reasonable grounds to believe that the person arrested was intoxicated in public. Therefore, the case is of little assistance.

[19] However, the legislation which followed it, is informative. Section 1 of the *Liquor Act*, R.S.Y. 2002, c. 140, expressly states that “‘intoxicated’ and ‘intoxicated condition’ each mean the condition a person is in when their capabilities are so impaired by liquor that they are likely to cause injury to themselves or be a danger, nuisance, or disturbance to others”. In my view, this is a codification of the definition most widely accepted in jurisprudence.

[20] I also agree with the reasoning, expressed in *Hofmeister*, *Lively* and other cases, that, if, under Section 87(6) of the *LCA*, a person “taken into custody may be released at any time if that person has recovered sufficient capacity that if released, he is unlikely to cause injury to himself or be a danger, nuisance or disturbance to others”, “he should not be arrested unless that condition exists”.

[21] I am of this view despite release under Section 87(6) being worded as being permissive only, as it would seem difficult to justify arbitrary continued custody if

that condition has been met. The Yukon *Liquor Act* appears to have responded to that issue by making release mandatory where:

“[T]here are reasonable and probable grounds for the person responsible for their custody to believe that (a) the person in custody has recovered sufficient capacity that, if released, they are unlikely to cause injury to themselves or be a danger, nuisance, or disturbance to others; or (b) a person capable of doing so undertakes to take care of the person in custody on their release.”

[22] For these reasons, in my view, a person is in an intoxicated condition, for the purposes of Section 87 of the *LCA*, when they are so impaired by alcohol that, due to such impairment, they: are unable to take care of themselves; are likely to cause injury to themselves; or, are likely to be a danger, nuisance, or disturbance to others.

ARREST UNDER S. 111(1) OF THE *LCA*

[23] Section 111(1) of the *LCA* provides that an “officer may arrest without warrant any person whom he finds committing an offence” against the Act.

[24] Our Court of Appeal, in *R. v. S.T.P.*, 2009 NSCA 86, at paragraphs 20 to 22, stated:

20 ... [A]n arresting officer must establish three things in order to meet the *finds committing* standard. Firstly, the police officer's knowledge must be contemporaneous to the event. Thus he or she must be present while the apparent offence is taking place. In other words, unlike the *reasonable and probable grounds* standard, it is not enough to believe that an offence has taken place in the past or is about to take place.

21 Secondly, the officer must actually observe or detect the commission of the offence. ...

22 Thirdly, there must be an objective basis for the officer's conclusion that an offence is being committed. In other words, ... "it must be 'apparent' to a reasonable person placed in the circumstances of the arresting officer at the time".

[25] As noted, the arrest in the case at hand occurred on Water Street in Digby during the Wharf Rat Rally. The Street was very busy, despite being only open to pedestrians, motorcycles and emergency vehicles, and it being after 2 AM.

[26] Along with other police officers, Constable Jared Daley observed Mr. Peters exiting Club 98. They saw him walking behind six or more members of "Sedition", which, is reputed to be, or to be affiliated with, an outlaw motorcycle gang. The Sedition members were wearing jackets with the organization's "patch".

[27] While following them, he was making gestures with his hands at waist level, including grabbing at his pants and pulling at his belt, causing his pants to go up and down. In addition, he was making gestures towards them and his lips were moving. These gestures appeared, to Constable Jared Daley, to be aggressive. He interpreted them as indicating Mr. Peters wanted to start a fight. However, Mr. Peters was still quite some distance behind the group.

[28] Constable Daley observed that Mr. Peters was walking forward in a straight line, without stumbling or falling. However, he noted that Mr. Peters appeared

“unsteady”, as he was going side to side. Constable Daley acknowledged that Mr. Peters may have been moving side to side as part of his hand gestures.

[29] Mr. Peters continued to follow them. Then, the biker at the rear turned and walked aggressively towards Mr. Peters. Other members of the group also turned and went towards him. That is the point at which Constable Daley first thought there would be an altercation. The police officers, who were right across the street, intervened.

[30] Constable Daley was amongst them. He observed the situation unfold. He had noted the bikers were wearing jackets with a patch which identified their group. However, he did not recognize it as being a Sedition patch.

[31] While the other officers intercepted the Sedition members, he went directly to Mr. Peters and spoke to him. When he got close enough to touch Mr. Peters, he smelled a strong odor of liquor coming from his breath, and immediately arrested him for being intoxicated in a public place. In doing so, he relied upon his authority under the *LCA*. He did so to remove Mr. Peters from the situation and hand him over to someone else to process.

[32] When it became clear that the biker group had been halted, one of the officers, Constable Timothy Garden-Cole, assisted Constable Daley in handcuffing

Mr. Peters, by immediately grabbing his free hand. He went to assist so that they could arrest Mr. Peters quickly, for officer safety reasons, due to there being hundreds of people around them.

[33] Constable Garden-Cole had recognized the Sedition patch and was familiar with the group. In addition, he had seen and heard the Sedition member at the rear turn and tell Mr. Peters that they were not bothering with him, while they continued walking with Mr. Peters following them. However, there is no evidence that he communicated any of that information to Constable Daley before, during or immediately after the arrest of Mr. Peters.

[34] They did not search Mr. Peters.

[35] They walked Mr. Peters across the street to the police van that was parked there to transport arrested persons. He was brought into the back of the van and turned over to Constable Klyszejko, who was tasked with transporting such arrested persons to the holding cells at the Digby Detachment of the RCMP.

[36] Constable Klyszejko had noted yelling back and forth between Mr. Peters and the Sedition members, including the Sedition members yelling obscenities at Mr. Peters. However, there is no evidence that he communicated that to Constable Daley.

[37] Mr. Peters testified that he: had part of a drink of orange juice and a liquor which she thought to be whiskey, on September 4, prior to going to Club 98 in the early morning hours of September 5; had two Budweiser beers at club 98 over three games of pool; and, was not intoxicated. However, the police did not have this information at the time they arrested him and took him into custody.

Therefore, it does not impact whether they had the requisite grounds to do so.

[38] This evidence shows that Constable Daley based his conclusion that Mr. Peters was intoxicated on what he observed or detected was occurring at the time, in his presence. Therefore, if what he observed or detected provides an objective basis for his conclusion, he has met the “finds committing standard”.

[39] That which Constable Daley observed was Mr. Peters following a group of bikers, while saying something and making gestures towards them, in circumstances where they could reasonably be interpreted as meant to instigate a confrontation, followed by some of the bikers turning around and walking aggressively towards him. That which Constable Daley detected immediately upon being close to Mr. Peters was a strong odor of liquor coming from his breath.

[40] In my view, at that precise moment, it would have appeared to a reasonable person, in Constable Daley’s circumstances, that Mr. Peters was so impaired by

alcohol that he was likely to at least be a nuisance or a disturbance to the group of bikers. As such, Constable Daley had sufficient grounds to arrest Mr. Peters.

[41] The circumstances made it such that Constable Daley, assisted by Constable Garden-Cole, had to remove Mr. Peters quickly from the situation to ensure their own safety and that of Mr. Peters. Those circumstances included there being: hundreds of people around them, many of which, according to Constable Klyszejko, were intoxicated; and, several members of a biker group who had been advancing aggressively towards Mr. Peters.

[42] They immediately brought Mr. Peters into the transport van, without even searching him, and left him there for Constable Klyszejko to transport. Therefore, the arresting officer, Constable Daley, did not have the opportunity to further assess whether Mr. Peter' s condition was such that he was likely to be a nuisance or disturbance, to determine whether he continued to have the requisite grounds for arrest.

[43] However, since the search in question only occurred later in the cells booking area, a finding that there were sufficient grounds for the initial arrest does not end the inquiry. I must still determine whether Constable Klyszejko, when he searched Mr. Peters, had the requisite grounds to take Mr. Peters into custody.

TAKING INTO CUSTODY UNDER S. 87(2) OF THE LCA

[44] Section 87(2) of the *LCA* states:

“Where an officer has reasonable and probable grounds to believe a person is in an intoxicated condition in a public place, the officer may, instead of charging the person under the Act, take the person into custody to be dealt with in accordance with this Section.”

[45] The requirement of “reasonable and probable grounds” is the same as that of “reasonable grounds”: *R. v. Loewen*, 2011 SCC 21.

[46] The Court in *Guray, supra*, at paragraph 20, outlined the test to determine the lawfulness of an arrest for being intoxicated in a public place under the British Columbia *Liquor Control and Licensing Act*, which is a “reasonable grounds to believe” test, as follows:

“[A] police officer may arrest a person if the officer has reasonable grounds to believe the person is intoxicated. A police officer must subjectively believe the person is intoxicated in a public place and that belief must be objectively reasonable. Reasonable grounds requires more than suspicion but something less than proof on a balance of probabilities.”

[47] The subjective belief will be objectively reasonable if “a reasonable person in the position of the peace officer, with all of his or her training and experience”, would come to the same conclusion: *R. v. Quilop*, 2017 ABCA 70, para 9.

[48] Once Constable Klyszejko arrived at the Detachment, accompanied by Auxiliary Constable Charles Peters, he removed Mr. Peters from the back of the

transport van. He detected an obvious smell of liquor. However, Mr. Peters was cooperative. Nevertheless, Constable Klyszejko concluded that, at that point, Mr. Peters was “intoxicated”.

[49] He was not “falling down drunk”. He walked from the van to the booking area. In doing so, his gait was a little slow. However, Constable Klyszejko noted that may have been due to his hands being cuffed behind his back.

[50] Constable Klyszejko brought Mr. Peters into the cells processing area, he removed the handcuffs from him. Mr. Peters walked around freely, talking with Auxiliary Constable Peters, who happened to be his cousin, while Constable Klyszejko took inventory of items Mr. Peters had emptied from his pockets and completed Prisoner Report Form C-13.

[51] Constable Klyszejko noted on Form C-13 that Mr. Peters’ balance was “fair”. He used that terminology because Mr. Peters was stable on his feet and had control of his balance. He was not stumbling or falling. Constable Klyszejko also noted that Mr. Peters’ state of mind was “placid” because he was cooperative and mellow.

[52] Constable Klyszejko described Mr. Peters as being compliant and talkative during the booking process. He was not agitated. He was merely explaining.

[53] After completing Form C-13, in preparing to lodge Mr. Peters in cells, Constable Klyszejko conducted a pat-down search on him. Such searches are to ensure the safety of the officers, the person being lodged, and others that may already have been lodged in the cells. In the process, he discovered a plastic baggie containing 15 small vials of white powder tucked in Mr. Peters' right sock.

[54] He then placed Mr. Peters under arrest for possession of cocaine for the purposes of trafficking. Up to that point, he had only told Mr. Peters that he was under arrest for being intoxicated in a public place.

[55] He completed the search of Mr. Peters and lodged him in cells.

[56] Powder from one of the vials tested positive for the presence of cocaine. After discovering that, the Constable also seized Mr. Peters' cell phone.

[57] He was aware that: he had other options besides lodging Mr. Peters in cells; and, the only reason Mr. Peters was searched was because he decided to hold him in cells.

[58] He said he assumed he made a call for someone to come get Mr. Peters, but believed he was unsuccessful in reaching anyone. The assumption was based upon him seeing, on the videotaped recording of the booking process, that he called someone and that the call was not made in a private room, as would likely be the

case if the call was made to a lawyer for Mr. Peters. However, he had not referred to any such call in his notes.

[59] He said he decided to hold Mr. Peters, and did not consider releasing him on his own, nor turn his mind to doing so, because he was of the view that Mr. Peters was still intoxicated.

[60] He conceded on cross-examination that Mr. Peters was: calm; polite; cooperative; alert; not staggering; able to take his pants off; could stand on one leg; not even agitated during the search; speaking clearly; placid; and, with fair balance, even on initial observation when Mr. Peters' hands were still cuffed behind his back.

[61] There is no audio portion to the videotaped recording of the interactions with Mr. Peters in the cells booking area. However, otherwise, it is consistent with these conceded descriptors of Mr. Peters' state, demeanor and actions.

[62] He initially indicated that his conclusion that Mr. Peters was intoxicated was based partly upon Mr. Peters having antagonized the bikers. However, he agreed that he did not see Mr. Peters unilaterally antagonize the bikers. He only saw them antagonizing each other. There was no evidence that, at the time he made his decision to lodge Mr. Peters in cells, anyone had advised him of the initial

behavior of Mr. Peters which was interpreted as being unilaterally inciting or antagonizing towards the bikers.

[63] Ultimately, on cross examination, he agreed that his conclusion that Mr. Peters was intoxicated was based upon him smelling liquor from Mr. Peters and Constable Daley having arrested Mr. Peters for intoxication in a public place. However, more likely than not, the antagonizing exchange between Mr. Peters and the Sedition members would also have been a factor he considered.

[64] In my view, in assessing whether he had reasonable grounds to believe Mr. Peters was intoxicated at the time of the search, Constable Klyszejko could not ignore the other observations he had made of Mr. Peters.

[65] A reasonable person in Constable Klyszejko's position, with the same training and experience, would also consider that: Mr. Peters was calm, not agitated, merely explaining, polite, cooperative, alert, and placid; and, he had sufficient balance to stand on one leg while taking his pants off, including fair balance even with his hands cuffed behind his back, as well good enough balance that he was not staggering;

[66] In my view, a reasonable person in such a position, and considering this constellation of relevant factors, would not conclude that Mr. Peters was so

impaired by alcohol that he was unable to care for himself, likely to cause injury to himself, or likely to be a danger, nuisance or disturbance to others.

[67] In subjectively concluding that Mr. Peters had the requisite level of impairment by alcohol, in my view, Constable Klyszejko either applied the wrong definition of intoxication or placed too much emphasis on the fact that Constable Daley had arrested Mr. Peters for being intoxicated in a public place.

[68] It may be that Constable Klyszejko, prior to removing the handcuffs from Mr. Peters in the cells booking area, still had the requisite grounds to believe Mr. Peters was intoxicated. However, thereafter, and prior to the search, in my view, those grounds no longer existed. Consideration of the additional factors discovered made it no longer objectively reasonable for him to continue holding that subjective belief.

[69] That was, more likely than not, less than one half hour after the initial arrest. That timeframe was known to Constable Klyszejko. There is no evidence to support any objectively reasonable belief that Mr. Peters' level of impairment by alcohol would have decreased sufficiently in that time to make it such that he could have been intoxicated at the time of the arrest, and not at the time of the search. Therefore, he ought also have recognized that: if Constable Daley had, at the time

of the arrest, become aware of these additional factors, he would not have had objectively reasonable grounds for the arrest either; and, the only reason Constable Daley was unable to make the same observations of Mr. Peters was because the circumstances demanded a rapid arrest and transfer. Consequently, Constable Klyszejko could not have justified continuing to take Mr. Peters into custody based on an objectively reasonable belief that Mr. Peters was in an intoxicated condition at the time of the initial arrest on Water Street.

[70] Mr. Peters testified that: he asked the police, both on Water Street and at the Detachment, to call his mother to come pick him up; but, they refused. However, I have determined that Constable Klyszejko did not have the requisite grounds to continue taking Mr. Peters into custody at the time of the search. Therefore, it is unnecessary to determine whether he failed to fulfill any duty to inquire into whether there was a person capable of taking care of Mr. Peters who would undertake to do so.

CONCLUSION

[71] Considering my finding that there were sufficient grounds for the original arrest, for the reasons outlined, based on the information available to the arresting officer at the time, I conclude that the initial arrest by Constable Daley was lawful.

[72] However, for the reasons outlined, I have found that, at least by the time of the search, Constable Klyszejko did not have reasonable grounds to believe Mr. Peters was intoxicated for the purposes of the offence of being intoxicated in a public place under the *LCA*, either while on Water Street or at the Detachment. Therefore, the continued taking into custody of Mr. Peters was not lawful.

[73] Counsel will now be required to submit briefs on the issue of exclusion of the seized evidence under Section 24(2) of the *Charter*, in accordance with the filing schedule set on May 3, 2017, which is as follows:

1. The brief of the Applicant, Mr. Peters shall be filed within two weeks of the receipt of this decision;
2. The brief of the Respondent, Crown shall be filed within two weeks of the filing of the Applicant's brief; and,
3. The reply brief of the Applicant shall be filed within one week of the filing of the Respondent's brief.

Pierre L. Muise, J.