Citation:	R. v. Truong	Date:	20080111
2008 BCPC 0073		File No:	185491-1
		Registry:	Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

HUNG VAN TRUONG

EXCERPTS FROM PROCEEDINGS

REASONS FOR JUDGMENT

OF THE

HONOURABLE JUDGE T.D. McGEE

Counsel for the Crown:	R. Beram
Counsel for the Defendant:	J. Solomon
Place of Hearing:	Vancouver, B.C.
Date of Judgment:	January 11, 2008

[1] THE COURT: The accused is charged with refusing to comply with an approved screening device demand contrary to s. 254(5) of the ***Code***. The date of the offence is January 7, 2007. Failure to provide a sample sufficient for analysis constituted the alleged refusal.

[2] At the outset of the trial which commenced December 3, 2007, it was agreed evidence would be heard on a voir dire to determine if the accused's rights under s. 10(a) and (b) of the ***Charter*** were infringed or denied. At the conclusion of the evidence, I heard submissions as to whether a five to seven-minute delay in the circumstances of this case constituted a s. 10(b) breach. I gave reasons for finding it did not.

[3] By written submission, defence counsel has raised further issues for consideration which have been addressed this morning. One is that the approved screening device has not been properly identified as an approved instrument. The evidence is that it was an Alco-Sensor IV without reference to the letters DWF or PWF as appear in the regulations. The officer conducting the test was not challenged as to whether this was an approved instrument and I am satisfied the reference provided is sufficient to conclude it was an approved instrument. Incomplete descriptions have been accepted in many cases as in ***The Queen v. Yurechuk***, (A.C.A.); ***The Queen v. Cross***, (O.C.A.); and ***Johnson***, (B.C.C.A.). I am mindful other cases have found the contrary.

[4] The next issue is whether a proper approved screening device demand was made. There are two concerns. The first is that this was not a demand for an approved screening device sample, but rather a Breathalyser demand, and the second is even if this was an approved screening device demand, there were not sufficient grounds for the demand.

[5] Constable Gibbons was the officer who made the demand. I would say at this point I do not think this is the sort of situation which occurred in ***The Queen v. Diruggiero***, [1998] B.C.J. No. 578. In other words, a demand was not made with the knowledge it would be refused so the accused driver could be charged.

[6] The relevant evidence is as follows. It was 9:45 p.m. on the date in question when a vehicle driven by the accused was pulled over for slowing down but not stopping at a stop sign. Constable Gibbons went to the passenger side of the car and shone his flashlight in the car. The accused looked at him and he said his eyes appeared glassy, glossy, watery. He said this was an indicia of impairment. He said his partner, Constable Villars, who had gone to the driver, then told him there was an odour of liquor emanating from the accused.

[7] Constable Gibbons said, "We decided to administer an approved screening device test to detect the volume of alcohol in the accused's blood." He said he based his demand on the appearance of the accused's eyes and the evidence of his partner who had informed him of an odour of liquor. Constable Gibbons said, "I formed the suspicion, reasonable grounds to believe, that this accused was intoxicated by liquor and driving a motor vehicle." He then said "impairment."

[8] Constable Villars said when he went to the driver's side or the accused's side of the vehicle, the window was down and he smelled an odour of liquor. He did not say from where. He said he asked the accused if he had anything to drink and the accused, gesturing with his fingers, said, "A little bit." This is not in his notes. Constable Villars said he told Gibbons he had smelled an odour of liquor and that the accused said he had consumed "a little bit." He said the accused had glazed eyes, an indicia of impairment.

[9] Section 254(2) of the ***Code*** provides in part as follows:

Where a peace officer reasonably suspects that a person who is operating a motor vehicle ... has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device ...

[10] The key is that the officer making the demand have a reasonable suspicion as to the existence of alcohol in the body of the person being investigated. While Constable Villars said he told Constable Gibbons the accused had said he consumed "a little bit," Constable Gibbons does not make reference to that information forming a basis for his demand and I am not satisfied beyond a reasonable doubt he was told that or heard that. Furthermore, Constable Gibbons said Constable Villars had told him there was a smell of liquor and then said it was a smell of liquor emanating from the accused. Constable Villars' evidence was simply that he had smelled an odour of liquor.

[11] I find the approved screening device demand was made on the basis of glassy eyes and an odour of liquor from somewhere. I am not satisfied that formed the basis for a reasonable suspicion the accused had alcohol in his body as required by s. 254(2) of the ***Code***. There was not a valid demand and the charge is therefore dismissed. It is therefore not necessary to determine whether this was, in fact, a Breathalyser demand pursuant to s. 254(3) as a result of which the accused's s. 10 rights were engaged.

[REASONS FOR JUDGMENT CONCLUDED]