COURT FILE NO.: St. Catharines - 2111-998-12-F1973-00
DATE: 2013-04-30

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

M.K.

Before Justice A.J. Watson
Heard on February 19 and April 11, 2013
Reasons for Judgment delivered on April 30, 2013

A. Brown ..... **for the Crown**
D. Genis ..... **for the accused, M.K.**

REASONS FOR JUDGMENT

WATSON J.:

[1] M.K. is charged with operating a motor vehicle having consumed alcohol in such a quantity that the concentration thereof exceeded 80 milligrams of alcohol in 100 millilitres of blood.

[2] The sole issue at this trial is whether the samples of the defendant's breath were taken "as soon as practicable" as required in section 258(1)(c)(ii) of the *Criminal Code*.

[3] Canada Border Services Officer (CBSO) Adam Alldridge testified that he was working at the primary line at the Peace Bridge on May 11, 2012. At approximately 11:35 p.m. the defendant approached driving a Jetta motor vehicle with four occupants. The defendant exhibited slow responses to his questions. He asked the defendant to exit to interview him separately and asked him if he had consumed any alcoholic beverages. The

defendant stated that he had consumed a few drinks. CBSO Alldridge testified that he read him the approved screening device demand from his notebook at 11:37 p.m. having formed a suspicion that he had been driving with alcohol in his system. He then radioed for assistance and escorted the defendant into a building where the approved screening device was located. CBSO McClure was involved in the ASD test and ultimately at 11:45 p.m. the defendant provided a sample of breath which registered "F" or "Fail". As a result CBSO Alldridge believed the defendant had in excess of 100 milligrams of alcohol in 100 millilitres of his blood and arrested him at 11:45 p.m. He then provided the defendant with his rights to counsel and the defendant requested to speak with duty counsel. He also made a breath demand of the defendant four or five minutes after his arrest. CBSO Alldridge testified that the defendant was to be transported to the Niagara Regional Police for the breath tests which is the usual practice since there is no instrument at the bridge.

[4] They left the Peace Bridge at midnight. While en route, he was advised by the Superintendent that there was an emergency and they were rerouted for one to two minutes and then got back on the highway. They arrived at Two District at 12:28 a.m. making no other stops en route and having taken the most direct route to Two District on Morrison Street in Niagara Falls. Custody of the defendant was then transferred over to the Special Constables.

[5] CBSO Alldridge testified that he attended to give P.C. Choy the grounds for the arrest at 12:38 a.m. CBSO Alldridge was also involved in contacting duty counsel at 12:53 a.m. and at 1:00 a.m. duty counsel called back. The defendant spoke with duty counsel at 1:00 a.m. and at 1:09 a.m. he was introduced to P.C. Choy whereupon CBSO Alldridge went upstairs to complete his notes. He was advised later of the sample results by P.C. Choy.

[6] In cross-examination CBSO Alldridge agreed that he could have contacted duty counsel for the defendant prior to providing his grounds to P.C. Choy.

[7] Canada Border Services Officer (CBSO) Tim McClure testified that he assisted CBSO Alldridge in the administration of the screening device to the defendant and the transportation of the defendant to Two District. He confirmed what he described as about a minute delay en route because they had been asked by their Superintendent to respond to another matter but then were told to disregard it and carry on.

[8] Niagara Regional Police Constable (P.C.) Ray Choy testified that he is a qualified breath technician and is designated to operate the Intoxilyzer 8000C. At 12:12 a.m. he was advised to attend Two District regarding a breath test. P.C. Choy testified that all Fort Erie Bridge tests are conducted at Two District Niagara Falls. He arrived at Two District at 12:27 a.m. and was still awaiting the arrival of the defendant. He did checks to ensure the instrument was in proper working order. He formed his opinion it was working properly. No time was given as to when he formed his opinion, however the self-test which was the last of the three tests was conducted at 12:35 a.m. P.C. Choy testified that he received the grounds for the arrest from CBSO Alldridge after he had prepared the instrument. At 12:46 a.m. he conducted a video check and the defendant was introduced to him at 1:09 a.m. The video of

the breath room was played and marked exhibit 4. Two samples of the defendant's breath were taken and the Crown introduced a Notice and Certificate of Analysis as Exhibits 6 and 7. I note that the Certificate sets out that the first sample of the defendant's breath taken at 1:18:20 analyzed at 90 milligrams and the second sample taken at 1:39:58 analyzed at 100 milligrams of alcohol in 100 millilitres of blood.

[9] He agreed in cross-examination that normally after the demand for breath samples is made there would be a radio call out regarding the nearest breath technician. In this case he was advised to attend at 12:12 a.m. The diagnostic tests occurred between 12:31 a.m. and 12:35 a.m. The video check and audio test of the tape took one to three minutes. It was submitted that the relaying of grounds is not a legal requirement so long as the demand has been read, however he testified that in practice they always relay the grounds. In re-examination he testified that it is when the grounds are given that they learn of the time of the arrest, rights to counsel and demand.

[10] Were the breath samples taken as soon as practicable?

[11] In R. v. Vanderbruggen, [2006] O.J. No. 1138 at paras. 12 and 13, the Ontario Court of Appeal summarizes the relevant law as follows:

> 12 That leaves the question that is at the heart of this appeal -- the meaning of as soon as practicable. Decisions of this and other courts indicate that the phrase means nothing more than that the tests were taken within a reasonably prompt time under the circumstances. See *R. v. Phillips* (1988), 42 C.C.C. (3d) 150 (Ont. C.A.) at 156; *R. v. Ashby* (1980), 57 C.C.C. (2d) 348 (Ont. C.A.) at 351; and *R. v. Mudry, R. v. Coverly* (1979), 50 C.C.C. (2d) 518 (Alta. C.A.) at 522. There is no requirement that the tests be taken as soon as possible. The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably. See *R. v. Payne* (1990), 56 C.C.C. (3d) 548 (Ont. C.A.) at 552; *R. v. Carter* (1981), 59 C.C.C. (2d) 450 (Sask. C.A.) at 453; *R. v. Van Der Veen* (1988), 44 C.C.C. (3d) 38 (Alta. C.A.) at 47; *R. v. Clarke*, [1991] O.J. No. 3065 (C.A.); and *R. v. Seed*, [1998] O.J. No. 4362 (C.A.).
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> 13 In deciding whether the tests were taken as soon as practicable, the trial judge should look at the whole chain of events bearing in mind that the *Criminal Code* permits an outside limit of two hours from the time of the offence to the taking of the first test. The "as soon as practicable" requirement must be applied with reason. In particular, while the Crown is obligated to demonstrate that -- in all the circumstances -- the breath samples were taken within a reasonably prompt time, there is no requirement that the Crown provide a detailed explanation of what occurred during every minute that the accused is in custody. See *R. v. Letford* (2000), 150 C.C.C. (3d) 225

(Ont. C.A.) at para. 20; *R. v. Carter, supra*; *R. v. Cambrin* (1982), 1 C.C.C. (3d) 59 (B.C.C.A.) at 61-3, and *R. v. Seed* at para. 7.

[12] The defence argues that the diversion of the cruiser while en route to Two District should factor into the overall delay in this case. I disagree. The delay was reasonably explained as an emergency diversion and was only a matter of a few minutes. I have no difficulty finding that this delay was reasonably explained and had little impact upon the overall delay to the taking of the first sample of the defendant's breath.

[13] On the evidence the defendant drove into the primary line at 11:35 p.m. The arrest, rights and demand had been completed by approximately 11:49 to 11:50 p.m. or as stated by CBSO Alldridge approximately four or five minutes after his arrest which was at 11:45 p.m. They left the Peace Bridge at midnight. They arrived at Two District Niagara Falls at 12:28 a.m. P.C. Choy had prepared the instrument, received the grounds for the arrest from CBSO Alldridge, and completed the video check within a minute or two of 12:46 a.m. The defendant had now been at the Division some 18 minutes. Although the defence argues that there is a complete absence of any evidence as to what the defendant was doing during those 18 minutes, there is evidence from CBSO Alldridge that he turned the defendant over to Special Constables. Although the defence argues that I cannot take judicial notice that there is a booking procedure, I disagree. Some time would be taken for this procedure and the lodging of the defendant into the cells. How much time is another issue but it would certainly in the normal course be no more than a matter of a few minutes.

[14] Be that as it may, the real issue in this case is why the call out to duty counsel was not placed until 12:53 a.m. The defendant had requested to speak with duty counsel when he was advised of his rights to counsel at the bridge. CBSO Alldridge who placed the call testified that there was no reason why the call could not have been placed at an earlier time. It would appear that P.C. Choy was in a position to conduct the tests at approximately 12:46 a.m. or a minute or two later, yet duty counsel had not yet been called. I do not wish to be seen as speculating as to what would have happened if the call went out at an earlier time but it is at least a real possibility given what did happen in this case once the call out had been made, that had the call been made within a reasonably prompt time after their arrival at the Division, the defendant would have been able to have been turned over to P.C. Choy when the video test had been completed. There is no evidence before me that would have precluded the defendant in the 18 minutes he had been at the Division once the booking procedure had been completed from speaking with duty counsel. What is clear is that after the call went out at 12:53 a.m., duty counsel was able to respond rather quickly, by 1:00 a.m. and the introduction of the defendant took place at 1:09 a.m. Although there was no evidence as to when the call ended, assuming it ended within the minute of the defendant being turned over to P.C. Choy, the entire call out, back and facilitation of the right to counsel may well have been able to have been completed by the time P.C. Choy was ready to facilitate the taking of samples if the call had been made at an earlier time.

[15] This is an unusual set of facts given that in most cases involving breath testing that come before me, the police seem to be alert to this issue and the call out to duty counsel is one of the first actions taken by the police. It is also reasonable in cases of this sort, where

the samples must be taken as soon as practicable in order for the Crown to be able to rely upon the presumption, that the call out to duty counsel be made as expeditiously as possible once at the Division. That was not the case here.

[16] I find both that there was no reasonable explanation for CBSO Alldridge to have placed the call out to duty counsel at 12:53 a.m. as opposed to at a much earlier time. As a result there was a very real possibility if not probability that the taking of the samples of the defendant's breath were significantly delayed. Noting that P.C. Choy was in a position to commence the testing procedure within a minute or two of 12:46 a.m. and the defendant was not turned over until 1:09 a.m., 21 minutes had elapsed. Duty counsel was not contacted until 12:53 a.m., five minutes after the instrument was ready to go and well over an hour after the defendant had made the request to speak with duty counsel. I have also considered the overall timing in this case from the driving to the taking of the first sample of breath which was taken approximately 18 minutes before the two-hour limitation period. However given the timing of the call out to duty counsel as set out earlier I cannot find beyond a reasonable doubt that the samples were taken as soon as practicable. I find that I do have a reasonable doubt as to whether the samples were taken in a reasonably prompt time in the circumstances of this case. The Crown is therefore not entitled to rely upon the presumption set out in section 258(1)(c)(ii) of the *Code* and the defendant will be found not guilty of the charge.

Released: April 30, 2013 **Signed:** "Justice A.J. Watson"

Justice A.J. Watson