Info#17-170338

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

TT

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE R. T. KNOTT
on June 8, 2018
at BROCKVILLE, Ontario

APPEARANCES:

K. Schultz	Appearing for the Crown
D. Genis	Appearing for Mr. TT

FRIDAY, JUNE 8, 2018:

R E A S O N S F O R J U D G M E N T

KNOTT, R. T. (Orally):

TTis charged that on or about the 21st day of May, 2017, at the Township of Leeds, in the Thousand Islands, without reasonable excuse did fail or refuse to comply with a demand made to him by a peace officer under subsection 253(3) of the *Criminal Code* and the circumstances therein mentioned to provide a breath sample into an approved roadside screening device where necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the *Criminal Code*. He was also charged with....

CLERK REGISTRAR: Sorry.

THE COURT: Okay. On consent, we did the trial with respect to the stunt driving charge that is on the same date, at the same time did, while performing a stunt 50 kilometres per hour or more over the posted speed limit, to wit speeding 160 kilometres per hour in a posted 100 kilometres per hour zone, contrary to Section 172(1) of the *Highway Traffic Act*.

SUMMARY

The accused will be found guilty of the stunt driving charge but not guilty of the refuse

breath sample. I found it unusual for a police officer to pull a nonaggressive driver out of his driver's seat on the side of the 401 but I do not find the officer used excessive force. I have not been convinced the officer had reasonable grounds for making the demand for a sample of the breath into the approved screening device and, thus it is not a valid demand.

I find the accused's Section 9 *Charter* rights were breached when the OPP did over-hold the accused at the Leeks, Thousand Islands detachment when it was the accused's passenger who was intoxicated, uncooperative and belligerent. I do not find this is the clearest of cases for a stay. Had I not dismissed the refusal charge I would have excluded the observations at the roadside, such that the accused would have been found not guilty of the refusal as a result of the *Charter* violation. I find that a sentence reduction on the stunt driving charge is the appropriate remedy for the over-holding violation.

THE FACTS

Constable Lamacraft was operating an unmarked cruiser alone on the 401. Traffic was light at that time of day. At 8:07 a.m. he saw a vehicle coming behind him at a very high rate of speed. He activated the radar, same direction, rear antenna, and achieved a steady lock of 160

kilometres per hour. His patrol speed was 113 in the right hand lane. He waited for the vehicle to approach the cruiser because usually a driver will slow down dramatically when they see the cruiser. So, the officer has to slow down further to let the driver pass so he can then require them to stop. This driver pulled out to pass the officer in the passing lane, maintaining his speed of 160 kilometres per hour. The officer sped up, caught up to the car and activated his emergency lights to get it to pull over. There are lights in the grill of the cruiser and on the rear-view mirror and on the side b-pillars. The officer said it was not a pursuit but he followed for one and a half to two kilometres, well past where the officer wanted the driver to stop. The officer tried to drive beside the car to indicate with hand signals to pull over. He estimated it was 15 to 20 seconds of hand signals to get the driver to stop. Ultimately the driver stopped. There was nothing unsafe about the stop. The officer didn't note the time of the actual stop. The officer stopped behind the vehicle and approached on the passenger side due to the 401 being a dangerous place.

There were two occupants, the driver and the passenger. The windows were down. Immediately on the stop the passenger was verbal, yelling racial epitaphs such as 'you are only stopping us because we are brown' 'you are a racist' 'you

fucking cops you are fucking racists.' The officer noted a strong odour of alcohol in the car. It smelled like beer. There was a case of Corona with a few full bottles with caps on and empty bottles in the coupe area of the car. They were not in the case, they were in the back of the car. The officer tried to have a conversation with the driver. He introduced himself and tried to explain the reason for the stop was travelling 160 kilometres per hour. The driver was saying nothing. The officer was unsure if the driver could hear him over the passenger yelling. The officer was trying to ask for the vehicle registration, proof of insurance and driver's licence and any particular reason the driver was driving that fast but there were no answers to any of the questions. The driver was seated, facing straight ahead. The officer's attention was focused on the passenger's behaviour. He didn't want it to escalate. He wanted to focus more on the driver. All the conversation was in English. The officer was concerned the driver would leave. Based on the smell of alcohol and the vehemence of the passenger there was an alcohol issue so the officer wanted to get the parties separated so he could determine those issues.

The officer broke with his usual practise and went to the driver's side to speak to the driver. Because the passenger was causing such

a ruckus he wanted to make clear to the driver the information requested. The driver's hands were in and around the steering wheel and he was staring straight ahead. The officer repeated his request for documents and other than the answer 'please' 'please' there was very little response from the driver. He asked the driver to shut the vehicle off and he did comply but the documents were not turned over. The officer opened the vehicle door, part of asking the driver to exit the vehicle to make a determination if the smell of alcohol was coming from him. He said 'sir, could you step out of the vehicle.' The officer was also concerned, based on the stop and the speed that the driver may try to leave the scene. Once before in 2009 this officer had been dragged down the highway and then bit. The driver's response to the officer opening the door was a blank stare. He looked at the officer and then looked ahead. The officer felt he was either not comprehending or not listening.

I note at this point that it would be very hard for the officer to determine if the accused smelled of alcohol when the accused was not speaking to the officer. The driver said little. He just kept saying 'please' over and over again.

The officer testified he explained the vehicle was going to be impounded and the licence

suspended. He told the driver this when he was seated in the vehicle. He was telling them the steps involved. The officer indicated three to four times he asked the driver to step out of the vehicle but he received a blank stare. Finally he put his hands on the driver and removed him from the vehicle. The officer believed he reached in and undid the seatbelt and grabbed him on the chest and lifted him out of the vehicle. He noted the driver gave him very little resistance. He said once he was out of the vehicle the accused was escorted back to the cruiser. The backdoor was opened and he was seated in the back of the cruiser with his feet out. The backdoor was not closed. There were no handcuffs applied and no search of the individual. The officer said his next step was to read him a breath demand. He didn't believe he had told the driver yet, he wanted to get him out of the car first and he said normally you get people out and we can discuss this.

He indicated no blows were struck of the accused. The accused did not make contact with the frame of his own car or the cruiser. The officer said he may have leaned him on the trunk of the cruiser while he opened the rear door but he was under control. He did not want the driver to back onto the 401. In court the officer demonstrated the removal from the car. He said there was no hitting and no grounding. In fact, he said the driver was very compliant.

He didn't resist in any way. It was the passenger who began to scream and yell and saying 'you're brutalizing my friend' 'you're a fucking racist, bro.'

As the officer put the accused in the back of the cruiser he asked for identification and the accused did give him his wallet, with an Ontario photo card. The accused had an address in Toronto and told he was on his way to Montreal to see his child. The accused was 56 years old, 5'8", 165 pounds.

The officer read the breath demand from his card in his pocket at 8:10. The accused indicated he did understand the approved screening device demand. He was asked by the Crown 'why did you issue the breath demand?' The officer said 'I believe he has been drinking. There was a strong odour of alcohol from his body. There were no signs of impairment because his driving was speed alone but there was a smell of stale beer. There was no other indicia because I was escorting him back. It was based on odour.' The officer testified he did have the Alcotest 6810 with him. At 8:11 he demonstrated the use at the time and it was working properly. Also at 8:11 he took out a fresh mouthpiece. He handed the accused a package sealed with the mouthpiece for the accused to open and then in the accused's view the officer attached the mouthpiece to the device. The officer felt

there was no issue with the accused complying with those instructions. There was an opportunity for the accused to ask questions. The officer demonstrated the use of the machine and asked if he had any questions. The accused nodded his head and said 'yes.' There was no indication he didn't understand.

The officer was holding the unit and the accused put his lips to the mouthpiece and the officer said 'you need to blow.' The accused pursed his lips but didn't blow. There was no sound for when the air is blown in. The officer asked the accused if he was clear on instructions and the accused nodded. The officer warned him of failing to provide a sample is the same as failing a roadside, it's the same penalty. The officer felt the accused understood. There was a second attempt. He expelled the same as the first attempt. He pursed his lips as if to blow but he didn't blow. The officer told him 'do you understand if you do not provide a sample you'll be charged?' He gave him another attempt. This is all sitting in the rear of the cruiser with his legs out. The third attempt was exactly the same as the first and second, with no air. The accused was told 'I'll give you one more attempt and charged if you don't provide a sample.' The officer made sure there were no obstructions in the tube. The officer said he believed the accused understood that the fourth time was his last chance but again there

was no indication on the approved screening device that any air was coming through. So, at 8:19 the accused was arrested for failing to provide a roadside sample. The accused was stood up, turned to face the vehicle and now he was handcuffed to the rear and given a frisk search. He was put back in the car and given rights to counsel and caution at approximately 8:20.

The other officers had not arrived yet. Sergeant Farrow arrived at 8:21. Constable Lamacraft briefed the attending officer the issue was the passenger and Sergeant Farrow went to deal with the passenger. Constable Lamacraft issued a summons at the roadside for the *Highway Traffic Act* offence and the driver's licence was seized at the time. The vehicle was to be towed from the scene, as per 172 of the *Highway Traffic Act*. The officer indicated that after the arrest the accused seemed dazed and confused, very quiet. At 8:26 Constable Sinclair arrived. The accused was told at the scene he would be released on a Promise to Appear. He wouldn't be held. The officer did up the paperwork, indicating the accused was released at 10:00 a.m. The officer indicated he could have been released at the roadside. The officer left the scene 21 minutes later, at 8:47, with the accused and went to the Thousand Island detachment. The officer was watching the other officers with the passenger and doing some

notes. The officer then stated he believed releasing the two individuals in a cab wouldn't be advisable. He did not want to make 'our problem someone else's problem.' Ultimately the accused was released at 3:40 p.m. on a Promise to Appear. He'd been in custody for six hours.

The officer noted that he was mistaken in his earlier evidence. He thought he had released the accused on an Appearance Notice and put in the 10:00 time. The officer thought he would be released shortly after they were done the paperwork but the officer testified that the accused fell asleep in the cell. He said he had no concern for the accused but he thought if the accused was sleeping, why wake him up and kick him out. The officer would let him sleep it off and then release him. The officer indicated there was no issues at all with the accused's behaviour in custody. He was asked about other indicia of impairment and the officer said 'other than promptly falling asleep in the cell, there were none.' He was asked about the decision to release the accused. He said 'I was the releasing officer. The factors to release was -- the intent was to release both individuals together but due to the passenger's behaviour and demeanour that was the driving force to keep them a bit longer. The concern was for their safety and the people who have to deal with them.' He indicated there was no complaint from the accused while in custody. He

was he asked 'why was held for so long?' He said 'we were looking for a change in demeanour when they wake up.' He said 'these gentlemen slept for a long time.'

In cross-examination Constable Lamacraft did agree that the vehicle did stop properly. He made notes of the exact exchange between the officer and the driver. He agreed that when he was on the passenger side he was not certain the driver could hear him speak to him because the passenger was shouting. The passenger did smell of alcohol and the passenger continued to act drunk throughout the interaction. When the officer came around to the driver's side and asked the driver to shut the car off, he complied. The officer confirmed that 8:07 was the first time he saw the vehicle driving and the breath demand was made at 8:10, after the stop. The officer stated that the driver looked dazed and confused after the arrest but there were no notes about this observation in his handwritten notes and he agreed that this observation was made after the breath demand and after the arrest. It was put to him that his notes at page three of his handbook said "pulled to shoulder. Forcibly removed driver due to nature of driving and strong smell of alcohol." That was his whole notes with respect to the stop.

In cross-examination he was again asked about

the -- addressing the decision to hold the accused. This officer felt that releasing one individual could not be released without the other. It was better to keep the pair together. He felt he erred on the side of caution. He again repeated he felt it was better for the accused to sleep it off than anywhere else. But, it was put to him in cross-examination that the prisoner security check confirmed that at 10:30 the accused was sitting up so he wasn't sleeping.

The officer was cross-examined extensively about whether he gave the accused four attempts to blow into the ASD or three. His evidence was he gave the accused four times the opportunity to blow and he noted that on the *HTA* ticket it noted four times. The officer testified as a practise he gives them four times. He made no notes about that but that was on the ticket issued. He agreed that in his arrest report that he prepared it said "the third and final attempt was the same as the two. There was no intention of complying with the demand and so at 8:19 he was arrested." The officer explained in testimony that he meant third and the final or fourth attempt was the same as the two.

The officer indicated he had not been involved in a lot of drinking and driving cases, maybe 20 to 25. He agreed that the indicia of impairment is important to be put down in his notes in

these cases. He agreed that while he testified he smelled alcohol off the accused, this observation was not in his notes and not in the arrest report. The officer said 'in speaking to driver, quickly determined cause to issue demand for roadside screening device.' There was no admission of the consumption of alcohol.

I note that the officer testified the driver did not speak to him in the car, he looked forward and said 'please' 'please.' It was the fact that the driver was not cooperative that led the officer to pull the driver out of the car and escort him to the cruiser, where he made the breath demand. As I stated, the only handwritten notes were "forcibly removed driver due to speed and smell of alcohol in vehicle." The officer testified at one point 'I removed him from the vehicle because I asked him to exit and he did not' but that reason is not in his notes either.

The officer confirmed in cross that he felt neither the driver nor the passenger were releasable from the roadside and they were going to the station but he confirmed in cross-examination that in his notes at 8:20, after the arrest he told the driver he'd be released at the roadside. Initially the officer testified it was the circumstances of the passenger that changed the decision to release but later the officer testified it was also due to the

driver's own impairment. The officer confirmed that between 8:20 and 8:47 he was doing his notes and the *Highway Traffic Act* forms at the roadside and he agreed that there was no notation of the smell of alcohol or signs of impairment from the accused during this time. He also confirmed that in all the notes, the General Occurrence Report, the arrest document and the *Highway Traffic Act* forms, there were no notes of the smell of alcohol from the accused's breath or from the driver directly and the officer said 'in those words, no.'

Sergeant George Farrow testified. He indicated he assisted Constable Lamacraft, who never calls for assistance on roadside stops, so he felt this was an officer needs assistance. When he arrived at the scene he received information from Constable Lamacraft. The issue was stunt driving and the arrested driver. The vehicle was being towed. He was told the passenger was uncooperative with him and he was having trouble with both parties. Sergeant Farrow dealt with the passenger to explain what the situation was, that the passenger couldn't remain inside the vehicle. The conversation went from being an explanation to being a negotiation. Sergeant Farrow did see an open case of beer in the vehicle. There were bottle caps of that type of beer in the foot well. He said the passenger was intoxicated, he was slow with his speech, slurred, movements were slow, his eyes were

glossed over and he was upset that his friend had been removed from the car and arrested. This officer had nothing to do with the driver. He provided observations that the accused was unsteady on his feet, very quiet but not vocal like his friend was. He added 'it was almost a dazed look to him and his quietness.'

In cross-examination Sergeant Farrow confirmed that he had notes that said that the driver was a suspended driver. He said he got that information from Constable Lamacraft. He said the driver and the passenger were highly intoxicated, said 'that is an observation I made on my own' but he agreed they were not in his notes. He only made notes with dealing with the passenger, the person he arrested and was dealing with. He agreed that there was no notes concerning the driver's sobriety. He said he recalled that. He agreed that the evidence regarding the beer caps are also not in his notes. That was the Crown's case.

The accused was called on the *Charter* application only. He is 32 and in 2011 came to Canada. His English is not 100 percent but if someone takes their time he can understand. He first saw the police when the officer had the emergency lights on behind him. The accused didn't testify about passing the unmarked cruiser or the officer driving beside him for a period of time, making hand signals. The

accused had picked up his passenger around 3:30, 4:00 a.m. for the drive to Montreal. The passenger was coming from a party, drunk. The accused testified he consumed no alcohol. At the police stop the officer went and spoke to the friend, then he came around and opened the driver's door. While he was talking to the friend the driver said he turned the engine off on his own.

My notes of the accused's evidence regarding the removal were the accused said 'he opened the door and pulled me out. The force with which he pulled me out I went a little to the side and I fell. Then he picked me up and took me towards the vehicle and handcuffed me immediately. He pulled me out. He was very angry. The way he held my hand I felt the force of it. He faced me towards the vehicle and immediately put the handcuffs on.' The accused said he had a little bit of body pain but required no medical treatment. The accused said he didn't know what was happening, he didn't know how to express himself. He said for a short while he didn't know what was happening and he felt very tired and weakness in his body.

The accused is employed and works for Brockport Home Service Systems making wall and floor panels for homes.

It was put to the accused that the officer

testified he put the handcuffs on only after the accused was arrested but the accused said no, he was handcuffed immediately. He was in handcuffs for 30 to 35 minutes. He was asked what was his understanding why he was being taken to the police station. He said 'he asked me to blow into the machine. Then he pulled me -- when he pulled me out I was frightened but I didn't ask him anything. I didn't know why I was taken to the police station and why I was sent to the cells. They took me there. They let me stay there. They didn't tell me why. I asked them how long I would be there. They said 'four hours.'' After that the officer came back and the accused indicated he asked him how long he has to be there and the officer said 'you are fine but your friend is not fine, we can't release him.' The accused indicated he asked the officer to let him out so that he could wait for him outside but the officer refused. The accused said he did lie down but he did not fall asleep. He said it was very cold in the cell.

In cross-examination the accused confirmed that the passenger would not be testifying at the trial and that the passenger did speak English. The accused agreed that he never told the officer he didn't understand what the officer was saying. The accused indicated that he did not know why he was stopped on the side of the road. The accused agreed with the assertion that if an officer opens your car door you would

take that to mean step out of the car. The accused agreed the officer didn't hit him. But, in cross-examination the accused asserted again that he was immediately cuffed behind his back when he was taken out of the car and he repeated that Constable Lamacraft open the package for the mouthpiece for the ASD. Furthermore, despite two officers seeing open and unopened bottles of beer in the car, the accused said there were no open beer bottles in the car. The accused agreed that at the time of the stop the passenger was still drunk. The accused minimized the passenger's comments to the police officer. He testified that the passenger was saying 'why are you doing this? What is the reason for this?' He was polite but loud.

ANALYSIS

The officer provided all the essential elements to prove the offence of stunt driving. The accused was driving at 160 per hour on the 401 where the speed limit is 100. The radar machine was identified and calibrated by the officer. He had tested it that day. He made the visual observation first that the accused was approaching him from behind at a high rate of speed before he activated his rear antenna for the radar device. After the accused passed the officer while the officer was driving at 113, the officer varied his own cruiser speed to confirm the radar device was working correctly.

The accused provided no evidence regarding his speed. The accused confirmed he first saw the police officer when the accused was ahead of the officer and the officer activated emergency lights.

Thus, I find the accused did approach the unmarked cruiser and overtook it while driving at 160 kilometres per hour without slowing down. He will be found guilty of the stunt driving charge.

As for the refusal charge, defence counsel argues the officer did not have reasonable grounds to make the approved screening device demand and thus there can be no refusal to an improper demand. He argues if the refusal charge is dismissed, the *Charter* violation for the use of excessive force at the roadside and the over-holding at the detachment should apply to the stunt driving sentence. In the alternative, if the officer did have reasonable suspicion to make the ASD demand, then the charges should be stayed due to the *Charter* violations. Or, in the alternative the observations at the roadside excluded on the refusal charge.

The Crown conceded that there was a Section 9 violation for the over-holding of the accused by the police. The passenger may have been

intoxicated and belligerent but there was no evidence that the accused was so impaired that required him to be held in the cells. The Crown submitted that the use of excessive force was not proven by the accused and that *Charter* allegation should be dismissed. The Crown submitted there were grounds for the ASD demand. The refusal had been proven but that the Court could either exclude the observations at the roadside as a result of the *Charter* violation for over-holding, pursuant to the Pino case, P-I-N-O, or the Court could go below the minimum punishments if the Court did not wish to exclude the observations at the roadside. The Crown submitted that this is not the clearest of cases to impose a stay.

The accused provided no evidence concerning the refusal, as he was called for the *Charter* application only.

Dealing with the issues of credibility, on the accused's *Charter* application he bears the onus of proof. On the refusal case the Crown bears the onus of proof to prove all the elements of the offence. I have the evidence of the accused and the two officers. I did not hear from the passenger or from Constable Sinclair.

Dealing with the allegation of excessive force at the roadside, I accept the evidence of Constable Lamacraft. The accused's evidence was

illogical and inconsistent at times. He said he was taken forcibly out of the car and was thrown to the ground but then conceded he may have lost his footing. He was not struck. He downplayed his passenger's behaviour. He denied there was open alcohol in the car, when both officers saw the bottles and the caps. He said he was immediately handcuffed when taken out of his car. He testified he was still handcuffed when the officer took the mouthpiece out of the wrapping for him to provide the sample of his breath. I have never heard of an officer removing the accused's mouthpiece from the wrapper. I prefer the evidence of Constable Lamacraft that when he did remove the accused from the car he did so under control. He didn't throw the accused, hit him or allow him to fall to the ground. The accused did not make contact with his own car or the police cruiser. He was seated in the rear of the cruiser, not handcuffed but with his feet out in order to perform the ASD test. This was a situation of a belligerent and intoxicated passenger and a non-cooperative or non-responsive driver. This is the first time I have heard of physically removing a driver on the side of the 401 who is accused of speeding and possible impaired operation. Other officers would have handled the situation differently but I find no excessive force in taking the accused out of his car, back to the police cruiser.

It was proper for the Crown to concede and I agree that there was a *Charter* violation for holding the accused in the cell for four hours. This was not the worst case of over-holding. The accused's passenger was intoxicated and belligerent and did fall asleep back at the detachment but the accused should have been released from the cell. As the accused testified, he would have waited in the lobby for the passenger to sober up and be released so they could travel together, but he should have been released.

There is no pattern of conduct as alleged by the defence counsel, nor have I heard of similar over-holding applications in this jurisdiction.

To address the remedy for the *Charter* violation, I must first address the allegation the officer failed to have proper suspicions for the ASD demand. The threshold for the ASD demand is low, as I know from R. V. Scoutan, from our Ontario Court of Appeal. It is not necessary that a person show signs of impairment to found a basis for making a roadside breath demand, nor is it necessary that a police officer suspect the person is committing a crime. All that is required is that the police officer making the demand has reasonable grounds to suspect that a person has alcohol in their body.

The Crown submitted that the officer must have

reasonable suspicion but he doesn't have to rule out all other explanation. It must be based on reasonable, discernable, objective facts. In this case the Crown submits the suspicion is based on the speed of the driving, the fact the driver didn't stop right away, the driver was not responsive to questions, would not hand over his documents, wouldn't get out of the vehicle and there was an odour of alcohol coming from the car, with an open case of beer in the car. The Crown submits the officer didn't need an odour of alcohol on the breath of the accused but the officer conceded that on the facts he had at the time he believed he needed to smell alcohol from the driver. This was based on the lack of other indicia like poor driving. There was no admission of the consumption of alcohol and there was the presence of two other sources for the smell of alcohol in the vehicle, other than from the accused himself. The officer testified once he got the driver out of the vehicle he smelled alcohol. While Constable Lamacraft testified about the smell of alcohol from the accused's body, he made no notes about the odour of alcohol coming from the accused's body or his breath. The Crown submitted that there may be reliability issues concerning the difference between the notes and the testimony but that goes to reliability and not credibility.

My notes concerning the officer's evidence in

this regard in-Chief said 'I believe he has been drinking. There was a strong odour of alcohol from his body. No signs of impairment because his driving was speed alone, but stale beer. No other indicia because I was escorting him back. It was based on odour.'

And at the same point in cross-examination the officer agreed he was expected to keep accurate and comprehensive and detailed notes and he confirmed that the timeframe involved was from 8:07 he saw the vehicle on the road and the breath demand was at 8:10 and that his only notes in this regard were "pulled to shoulder. Forcibly removed driver due to nature of driving and strong smell of alcohol."

I note that the officer saw the vehicle at 8:07 coming from behind. He had to allow the vehicle to overtake him, then he followed the vehicle for one and a half to two kilometres to get the vehicle to stop. He noted no bad driving in that time, apart from the speed. The stop was safe. The officer then approached the passenger side and tried to address the driver with the loud belligerent passenger yelling. The officer came around to the driver's side. He tried to speak to the driver concerning the documents. Then opened the door to get the driver out of the vehicle. He then removed the driver from the vehicle and escorted him back to the cruiser's backseat, such that by 8:10 he read

the breath demand. That is a lot to transpire in three minutes, with scant notes concerning that interaction.

I note that neither the officer's observation of the driver being dazed and confused, nor about the smell of alcohol from the driver were in his notes. Just because they were not in the officer's notes does not mean he didn't make the observations. The officer's notes are not evidence, they are a means to refresh his memory.

Justice Bourgeois in R. v. Martin from 2016 ONCJ 799 observed in that case "The officer took very little notes. In fact, the only notes he took in relation to his observations of her signs of impairment were upon his arrival, during this one minute period of time before making the approved screening demand."

Justice Moldaver in Wood v. Schaeffer from 2013 SCC 71 stated "To reiterate the importance, in fact the duty of a police officer to make notes to the justice system..." he quoted from the Martin's Committee Report at paragraph 66 "...the notes of an investigator are often the most immediate source of evidence relevant to the commission of a crime. The notes may be closest to what the witness actually saw or experienced. As the earliest record created, they may be the most accurate."

Returning to this case, Constable Lamacraft testified largely from memory, without referring to his notes. It may be the smell of alcohol or the grounds for the ASD demand were obvious to him but I am troubled by the lack of notes about the grounds for the ASD demand when so much was going on in that brief period of time. I cannot see how the officer had distinguished if the smell of alcohol came from the car, the passenger or from the accused at the point of removing the driver from the car and escorting him to the cruiser when the driver had not spoken directly to him. As I have stated, Constable Lamacraft conceded he needed the smell of alcohol to make the ASD demand, absent the other indicia.

In the evidence concerning the officer's interaction with the driver when the driver was still in the driver's seat, the accused kept looking forward and was not speaking to the officer, other than saying 'please' 'please.' The officer grew upset and forcibly removed the driver. I have the suspicion the officer was frustrated by the lack of response from the driver and being on the side of the 401 and having been dragged by a motorist previously back in 2009, the officer was impatient with the driver's noncompliance. Don't forget this whole interaction from the time of seeing the vehicle, to the breath demand was three minutes.

The officer was mistaken about other documents that he prepared, other than the part about releasing him. As I stated, initially he completed the paperwork to release the accused at the scene but later stated the accused was taken to the detachment due to the condition of the passenger and he wanted to release the two of them together. But, he testified that the accused was detained because he fell asleep in the cell and the officer didn't want to wake him. But, when confronted with an actual log the officer agreed that the log stated that the accused was sitting up and not sleeping. It was the passenger, I believe who was sleeping. Later the officer tried to justify the detention of the accused, saying that the accused was impaired but the reason for the detention was not in the officer's notes.

The Crown must prove that it is a valid demand, both subjectively and objectively. It is difficult to objectively discern what the officer's suspicion was to make an ASD demand when the time to make the observations was so short, with so much happening, such that the officer's testimony on this issue was unclear and there are essentially no notes concerning those observations. The lack of notes makes it difficult to determine whether the officer's suspicions were reasonable. The Crown must prove the validity of the demand beyond a reasonable doubt. The suspicion is found only

in the officer's testimony and not in his notes. And the notes do not reflect other evidence. For example, the officer told the accused he would be released at the scene and the accused was then detained. Sergeant Farrow testified Constable Lamacraft told him the driver was a suspended driver and that both the accused and the passenger were grossly intoxicated but Constable Lamacraft said 'no, we were clear on that point, neither statement was accurate.'

I have not been satisfied beyond a reasonable doubt that Constable Lamacraft had a reasonable suspicion the accused had alcohol in his body to warrant making an ASD demand. Since this was not a valid demand the accused cannot be compelled to comply with the demand.
I must still consider the Grant analysis arising from the *Charter* violation for over-holding. As everyone is aware R. v. Grant from 2009 SCC 32 outlines a test for the exclusion of evidence under Section 24(2). "A Court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to the following three points. 1) the seriousness of the *Charter* infringing state conduct, 2) the impact of the breach on the *Charter* protected interests of the accused, and 3) society's interest in the adjudication of the case on its merits."

I'm aware of the court of appeal's decision in

R. v. Iseler, I-S-E-L-E-R, from 2004, from the Ontario Court of Appeal. I agree with the Crown that this is not the clearest of cases to warrant a stay of proceedings. I have heard no cases in this jurisdiction concerning any or a systematic discrimination of over-holding. There was no evidence of that issue, as in Iseler. This Section 9 breach was a breach but it was just over the line.

I am also aware of the aforementioned decision of R. v. Pino, 2016 Ontario Court of Appeal 389. At paragraph 72 of Pino the court of appeal adopted a purposeful approach to the evidence obtained in a manner analysis. Under this approach five considerations apply. 1) the approach should be generous, consistent with the purpose of Section 24(2), 2) the Court should consider the entire "chain of events" between the accused and the police, 3) the requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct, 4) the connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections and 5) the connection cannot be too tenuous or too remote."

I'm also aware of the recent court of appeal decision in R. v. Jennings from this year where the court of appeal addressed the exclusion in evidence in over 80 cases. That case albeit was

dealing with breath readings.

In this case I do find the chain of events from the accused being pulled out of his car, the observations made at the side of the road, his forcibly walked back to the police cruiser, then taken to the police detachment and held in the cell far longer than was required, is all part of one chain of events. There was a temporal connection between the observations at the roadside and the subsequent *Charter* breach. The connection is not too tenuous or too remote.

In the Grant analysis "The first line of inquiry requires the Court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct."

It is clear that any *Charter* breach is a serious matter, however it is important to consider the breach on a scale of seriousness with blatant disregard to someone's *Charter's* rights as being extremely serious. A violation of Section 9 of over-holding or delaying the release of an accused is, in my view a serious breach. The accused's liberty was taken away from him. This was a highway traffic stop that quickly turned into a forcible removal and subsequent refusal

case and deprived someone's liberty for a number of hours. That needs to be taken seriously.

I did not find removal from the car was excessive force but I do not wish to be taken as concluding that this was acceptable or routine conduct. The accused was treated far more harshly at the roadside than his belligerent passenger. The *Charter* breach, together with the additional conduct which, when looked at collectively, adds to the seriousness of the breach.

Accordingly, I conclude there was sufficiently serious *Charter* breach in this case and the circumstances about the conduct would favour the exclusion of the evidence. This behaviour needs to be condoned and a strong message needs to be sent that these type of conduct are not to be tolerated.

The second stage of inquiry "focusses on the seriousness of the impact of the breach on the *Charter* protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed."

It's clear that unjustified imprisonment of someone still presumed to be innocent significantly impact upon the *Charter* protected right of non-arbitrary detention or

imprisonment. I recognize this accused would've remained at the detachment to await the release of his passenger but his liberty would not have been restrained.

Accordingly, in the circumstances the impact on this *Charter* protected right slightly favours the exclusion of evidence.

The third phase of the test "focuses on society's interest in the adjudication of the case on its merits." Will the truth seeking function of the criminal trial process be better served by the admission or the exclusion of the evidence?

The evidence in our case is the officer's observations at the roadside, they're not the results of a breathalyzer machine. The observations are critical but they are not as reliable as the results of a breathalyzer machine. All drinking and driving cases are serious matters. These factors militate slightly in favour of admitting the evidence.

When I balance all the relevant factors in this matter I am satisfied that the defence has established that the inclusion of the observations at the roadside, given the nature of the violation, would bring the administration of justice into disrepute. If required, I would have excluded the observations made at the

roadside to justify the ASD demand.

The observations of the speeding and the radar evidence of the stunt driving charge are completely separate from what transpired after the stop. That offence was made out prior to the officer even stopping the car.

Since I have found the accused guilty of the stunt driving charge, the appropriate disposition for the *Charter* violation would be to consider a sentence reduction for the stunt driving charge and I will hear submissions in that regard.

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Form 2

I, Cindy Liscombe, certify that this document is a true and accurate transcript of the recordings of Regina v. Theivendraraja, in the Ontario Court of Justice held at 41 Court House Square, Brockville, Ontario, taken from recording No. 1911_CR03_20180608_085905__6_KNOTTR which has been certified in Form 1.

October 29, 2018 — Date

Cindy Liscombe — Signature

Photostatic copies of this transcript are not certified and have not been paid for unless they bear the original signature of C. Liscombe.