ONTARIO COURT OF JUSTICE

CITATION: R. v. XXX XXX, 2018 ONCJ 45

DATE: 2018 01 23

COURT FILE No.: Central East - Newmarket -16-01804-00

BETWEEN:

HER MAJESTY THE QUEEN

— AND —

XXX XXX

Before Justice John McInnes

Heard on May 29 and November 2, 2017

Reasons for Judgment released on January 23, 2018

B. McCallion..... counsel for the Crown

D. Genis..... counsel for the defendant XXX XXX

McINNES J.:

[1] XXX XXX is charged with driving while he was impaired and with a blood alcohol concentration exceeding 80 mg/100 ml.

[2] At about 5:40 p.m. on February 23, 2016, Irina YYY YYY was waiting at a red light at the intersection of Bathurst St. and Townsgate Dr. in Vaughan when she was struck from behind by a vehicle operated by the defendant. Ms YYY YYY testified she smelled alcohol on the defendant during their interactions on scene and called police.

[3] When she testified, Ms YYY YYY was straining to remember the events. In cross-examination she could not recall telling the 911 operator she was unsure whether she smelled alcohol until the tape was played. On the recording, the 911 operator had asked her if she smelled alcohol on the other driver and she replied “yeah…well I’m not definitely sure”.

[4] PC Matthew Storrey testified that he was dispatched to the scene at 5:42 and was told over the radio that one driver on scene was suspected of being impaired. When he arrived at 5:59 p.m., he spoke to Ms YYY YYY and then, at 6:05 p.m., to the defendant. PC Storrey testified he detected an odour of alcohol from the defendant and noted he had glossy eyes. At 6:06 p.m. he read an ASD demand.

[5] The defence seeks exclusion of the breath results on the basis that PC Storrey lacked grounds for the ASD demand. The defence position is that PC Storrey did not detect an odour of alcohol and that he had relied on the hearsay information conveyed to 911 from Ms YYY YYY, information that was itself equivocal.

[6] This position draws support from the fact that other officers on scene did not smell alcohol on the defendant’s breath. It is an agreed fact that one of them, PC Brown, arrived before PC Storrey and that at 18:05 PC Storrey told PC Brown that due to the defendant’s glossy eyes, demeanour and the fact the other driver smelled alcohol, he wanted to make ASD demand. PC Brown did not smell alcohol on the defendant’s breath and PC Storrey never told PC Brown that he, PC Storrey, smelled alcohol on his breath. Another officer on scene who had also dealt with the defendant, PC Legall-Gabriel, did not smell alcohol on his breath. She too had received information from dispatch to the effect the other driver thought the defendant was impaired.

[7] The Charter application became more complicated when PC Storrey gave evidence in cross-examination about his decision not to engage his own in-car camera/audio recording system during his interaction with the defendant. Near the outset of the cross-examination he testified:

…typically I use it for a traffic stop, it's kind of new for me, using a microphone in general but you pick it up you put it in your vest, and then you go out. To be honest in a number of collision investigations, at that time in my work I was not familiar with the system I hadn't been using it for long, so I wasn't practised in taking the microphone out, normally I remember it if I catch a speeding car or cars at a stop sign or something like that, it's kind of second nature, but with a lot of calls that I generate I frequently leave range from the car, or I get too far away from the car, then it starts to vibrate, it loses its signal, so I haven't made it a practice to take my microphone with me.

[8] Asked "so you made it your practice to take it with you or not to take it with you?" he replied "for traffic stops and things like that when I know I'm to be next to the car, I do. For what I would call investigative calls when we're going to an address are dealing with a collision or something like that, I do not."

[9] PC Storrey explained that he classified this as an investigative call in which he would be leaving his cruiser and talking to several people and so as his normal practice he did not take the microphone with him. He added, "[t]he microphone in his car would remain on but the one he would take out of the holder and put on his vest he would leave behind because it would either lose range or something like that." Asked if he had ever complained about this, he replied that "it was common knowledge amongst officers and YRP and he had discussed it with the supervisors that the device vibrates as the officer gets further from the police vehicle."

[10] Asked for further particulars regarding what his supervisors had told him, PC Storrey replied "I don't recall exactly, I think maybe it's a limitation on the system but I can't speak for it, I didn't design it". Asked "so did they authorize you to continue that practice?", PC Storrey replied "[y]es, use it when it's available if you can, other than that I don't think there's any specific procedure for when not to other than for taking statements and things like that."

[11] When he was asked if it would surprise him that other officers used their microphones during this investigation and they seemed to function, PC Storrey replied “it wouldn’t surprise me. At the same time it would not surprise me if they did not. I believe it’s a very grey area with the microphones.” Asked “so you’re entitled to do as you see fit basically that’s your position?” the officer replied “no, no I follow my supervisor’s direction, the procedure is use it if it’s available there are specific instances when you do not but in situations where I know I’m going to be away from the vehicle or talking with a number of different people I do not use it.”

[12] Following the conclusion of this evidence on May 29, the case was adjourned to September 7 and then November 2, 2017 for continuation and to enable defence to pursue s.7 argument regarding PC Storrey’s decision not to activate his microphone. In connection with the latter, the defence sought disclosure of the names of and will-say statements for all supervisor officers PC Storrey was referring to in his testimony.

[13] PC Storrey’s initial response to this disclosure request was that he could not recall the names of the officer who had approved of his practice. Ultimately, some months later, PC Storrey indicated he had received no such instruction from any supervisor. The Crown agreed I could rely on those representations as if they were part of PC Storrey’s testimony.

[14] In addition to his argument that PC Storrey lacked the requisite grounds for a s.254(2) ASD demand, the defendant has added the argument that PC Storrey’s failure to activate his in-car camera system [“ICCS”] breached s.7 of the Charter.

[15] Generally there is no positive duty to record interactions with the public even where the equipment is available, and s.7 claims generally fail when brought in cases of inadvertent failure to record, as my colleague Henschel J. explained in R v Kurmoza, 2017 ONCJ 139 (CanLII), paras 16-20. But as she added, at para.21:

The absence of a constitutional obligation to record interactions does not mean that a failure to do so could never constitute a breach of the Charter. For example, a Charter violation might be established where an ICCS is available and the police deliberately choose not to activate the system in order to prevent an independent record from being made in order to obfuscate the true state of affairs or where in the particular circumstances of a case the absence of a recording rendered the trial unfair [citations omitted].

[16] I strongly suspect the present case meets the above description; however, it is unnecessary to finally decide the point because given PC Storrey's recantation of his testimony before me, I am not prepared to rely on his evidence in relation to his grounds for the ASD demand. Consequently, there is no reliable evidence that the statutory pre-requisites for a valid s.254(2) demand were met. Since the Crown has failed to prove that seizing the defendant's breath samples was authorized by law, the s.8 breach is established.

[17] In applying s.24(2) of the Charter I must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard for (i) the seriousness of the Charter-infringing state conduct; (ii) the impact of the breach on the Charter-protected interests of the accused; and, (iii) society's interest in the adjudication of the case on its merits: R v Grant, 2009 SCC 32 (CanLII), [2009] 2 SCR 353; R v Harrison, 2009 SCC 34 (CanLII), [2009] 2 SCR 494.

[18] There is a continuum of Charter-infringing state conduct that extends from the negligent or inadvertent to the knowing or intentional subversion of constitutionally protected rights. Here the breach falls much closer to the latter end of the spectrum and was aggravated by what was at best PC Storrey's reckless disregard for the truth and at worse outright perjury before me.

[19] Proceeding with an arrest and breath demand absent subjective and objective grounds is a serious rather than a technical or minor violation. While good faith can reduce the seriousness of the violation and the need for the court to disassociate itself from the police conduct, "neither negligence nor wilful blindness by the police can properly be characterized as good faith" and while "[d]eliberate, wilful, or flagrant disregard of Charter rights may require exclusion of the evidence…[e]ven a significant departure from the standard of conduct expected of police officers will lean this aspect of the inquiry in favour of exclusion of the evidence": R v Rehill, 2015 ONSC 6025 (CanLII) at para. 28. I find the Charter breach before me falls towards the serious end of the spectrum and weighs in favour of exclusion.

[20] Although the seizure of the defendant's breath samples was minimally invasive, in considering the impact of the breach on the Charter-protected interests of the defendant I must also consider the impact of the deprivation of liberty caused by the unlawful arrest. I find the impact was serious and the officer's later conduct also implicated the defendant's fair trial rights.

[21] Ultimately, balancing the Grant factors on the facts of this case comes down to my determination of "whether admitting the evidence would send the message to the public that courts condone deviations from the rule of law by failing to dissociate themselves from the fruits of unlawful conduct": Rehill, para. 28. In my view, admitting the evidence would clearly have that effect and this outweighs society's interest in an adjudication on the merits. It follows that admitting the breath results would bring the administration of justice into disrepute and consequently they must be excluded under s.24(2) of the Charter.

[22] The Crown concedes the observational evidence of impairment falls well short of proof beyond a reasonable doubt. There is no evidence the defendant was "over 80". Accordingly, both charges are dismissed.

Released: January 23, 2018

Signed: Justice John McInnes