

In the Court of Appeal of Alberta

Citation: R. v. Caruth, 2009 ABCA 342

Date: 20091021
Docket: 0803-0022-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Ronald Kenneth Caruth

Appellant

The Court:

**The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice J.D. Bruce McDonald**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice K. L. Sisson
sitting as a Summary Conviction Appeal Judge
on the 21st day of December 2007
(Trial Docket: 060468303S1)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant was granted leave to appeal his conviction for driving with a blood alcohol level over the legal limit. Leave was granted on two questions of law:

1. Whether or not the trial judge and the learned summary conviction appeal judge erred as a matter of law in their interpretation and application of the legal basis for a lawful demand by a peace officer pursuant to section 254(3) of the *Criminal Code of Canada*; and
2. Whether or not, under all the circumstances of this case, (a) there was a violation of section 8 of the *Canadian Charter of Rights and Freedoms* in consequence of any inadequacy in the legal basis for the officer's demand pursuant to section 254(3)(b) of the *Criminal Code* and (b) whether or not there should be exclusion of evidence pursuant to section 24(2) of the *Charter* as a result of the alleged infringement under section 8 of the *Charter*?

II. Facts

[2] On March 22, 2006 at 2:55 p.m., the appellant's vehicle was stopped by Constable Percy of the Killam R.C.M.P., who had received a civilian's complaint about an impaired driver in clothing and a vehicle matching the appellant's.

[3] Constable Percy observed impaired behaviour on the part of the appellant and asked him to blow into a roadside screening device. The appellant did so and the result was a "fail" reading, indicating that his blood alcohol concentration was over the legal limit. The appellant was arrested for impaired driving, advised of his *Charter* rights, and read a breath demand. The appellant declined when asked if he needed to retrieve any medication from his vehicle.

[4] At the detachment, after being given an opportunity to contact counsel, the appellant's first attempt to provide a breath sample recorded a "deficient sample". Constable Percy, who was also the qualified breath technician, opined that the appellant was not exhibiting the signs of someone who was providing a strong breath.

[5] The appellant was advised he would be charged with refusing to provide a breath sample. When the appellant protested that he had done so, Constable Percy asked whether the appellant had any medical condition that precluded him from providing a breath sample. The appellant responded, "asthma".

[6] Constable Percy, as a prerequisite to charging the appellant with refusal to provide a breath sample, conducted a diagnostic test to ensure the breath testing instrument was functioning properly. It resulted in an “invalid test” error message. It was not until six days later that the constable was able to determine there was nothing wrong with the instrument.

[7] Constable Percy testified that he did not observe any symptoms of asthma; however based on his own personal experience with asthma, he determined that the appellant may have suffered a minor asthma attack, resulting in his inability to provide an adequate breath sample. Consequently, the constable concluded the appellant was physically incapable of doing so and read him a blood demand.

[8] While at the detachment, the appellant repeatedly consulted with counsel. Before the blood demand was made, the constable re-read the appellant’s *Charter* rights and a caution, then took the appellant to the hospital, where the appellant again contacted counsel and then had a blood sample taken.

III. Decision of the Trial Judge

[9] The appellant was charged under sections 253(a) and (b) of the *Criminal Code*. At trial, his counsel argued that the blood sample evidence should be inadmissible because Constable Percy had failed to determine that it was impracticable to take breath samples. The trial judge concluded that Constable Percy had accepted in good faith the appellant’s indication that he had asthma and therefore reasonably believed it was impractical to take a breath sample on that basis. The trial judge determined it was unnecessary for Constable Percy to confirm the appellant’s medical condition with a physician and that section 254 of the *Criminal Code* is broad enough to permit the taking of a blood sample in these circumstances. On all of the evidence, the trial judge convicted the appellant of driving with a blood alcohol level over the legal limit under section 253(b) of the *Criminal Code*. The trial judge also found the appellant guilty of impaired driving under section 253(a) of the *Criminal Code* but imposed a conditional stay on that count.

IV. Decision of the Summary Conviction Appeal Judge

[10] The summary conviction appeal judge concluded that on both subjective and objective grounds, Constable Percy had reasonable and probable grounds to make the blood demand based on the appellant’s indication that his medical condition of asthma prevented his providing a proper breath sample. He held that the error message on the breath testing machine was of no consequence. The summary conviction appeal judge found that Constable Percy followed the procedures as outlined in *R. v. MacMillan* (1989), 78 Nfld. and P.E.I.R. 163 (P.E.I.S.C.), and no breach of the *Charter* had occurred.

V. Relevant Legislation

[11] The basis for a demand as set out in section 254(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, at the time of the incident was as follows:

(3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon as is practicable

- (a) such samples of the person's breath as in the opinion of a qualified technician, or
- (b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,
 - (i) the person may be incapable of providing a sample of his breath, or
 - (ii) it would be impracticable to obtain a sample of his breath, such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples

are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

(4) Samples of blood may only be taken from a person pursuant to a demand made by a peace officer under subsection (3) if the samples are taken by or under the direction of a qualified medical practitioner and the qualified medical practitioner is satisfied that the taking of those samples would not endanger the life or health of the person.

VI. Standard of Review

[12] The parties agree that whether the trial judge and summary conviction appeal judge applied the correct legal standard is a question of law and therefore, the standard of review is correctness.

VII. Analysis

Issue 1: Whether or not the trial judge and the learned summary conviction appeal judge erred as a matter of law in their interpretation and application of the legal basis for a lawful demand by a peace officer pursuant to section 254(3) of the *Criminal Code*?

A. Appellant's submissions

[13] The appellant submits that the first requirement is that the peace officer must have reasonable and probable grounds to believe in the commission of a predicate offence contrary to section 253 of the *Criminal Code*, and secondly, that the individual is incapable of providing a sample of breath or it is impracticable to obtain a breath sample from him.

[14] The appellant's counsel submits that the trial judge applied too low a threshold to the requirements under section 254(3)(b) that an officer have reasonable and probable grounds before a blood demand can be made. The trial judge applied the threshold of whether it was feasible to take a breath sample. In this case, he submits there were no observable manifestations of an asthma attack and without any obvious incapacity to provide a breath sample, the required reasonable and probable grounds, on an objective basis, did not exist.

[15] He further submits the failure to make any inquiry of medical staff concerning the appellant's physical condition and relying instead on the constable's personal experience with asthma is a purely subjective approach and failed to apply the subjective and objective tests described in case authorities such as *R. v. Bernshaw*, [1995] 1 S.C.R. 254, [1994] S.C.J. No.87.

[16] Appellant's counsel goes on to submit that the trial judge and the summary conviction appeal judge both discounted the importance of the instrument error message following the constable's diagnostic test, which objectively prevented a conclusion that the appellant had failed or refused to provide a breath sample.

B. Test under Section 254(3)(b)

[17] Neither the oral reasons of the trial judge nor the oral reasons of the summary conviction appeal judge reveal an error in their interpretation of the legal basis for a demand under section 254(3)(b).

[18] Given the highly intrusive nature of taking a blood sample, the state must comply strictly with the conditions set forth in the *Criminal Code* before such a substantial interference is authorized and justified: *R. v. Pavel* (1989), 53 C.C.C. (3d) 296, 74 C.R.(3rd) 195 (Ont. C.A.).

[19] In the circumstances of this case, in order to make a demand under section 254(3)(b), the peace officer must first have reasonable and probable grounds to believe that the accused is or has within the previous three hours operated a motor vehicle while his/her ability is impaired by alcohol,

and further, that the officer must reasonably believe the accused may be incapable of providing a breath sample or it would be impracticable to obtain a breath sample. The incapacity or impracticability must be by reason of any physical condition of the person.

[20] In *R. v. Shepherd*, 2009 SCC 35, [2009] S.C.J. No. 35, rendered after the decisions in this case, the Supreme Court of Canada, confirmed that the test described in *Bernshaw* has both a subjective and an objective component in establishing reasonable and probable grounds; the officer must subjectively have an honest belief and objectively there must exist reasonable grounds for this belief. As stated in *Shepherd* at para. 23, the peace officer “need not demonstrate a *prima facie* case for conviction before pursuing his investigation.”

[21] Whether or not the officer’s belief was reasonable is based on “facts known by or available to the peace officer at the time he formed the requisite belief.”: *R. v. McClelland* (1995), 165 A.R. 332 at para. 21, 98 C.C.C. (3d) 509 (C.A.). Individual pieces of evidence are not to be tested; “the question is whether the total of the evidence offered provided reasonable and proper grounds, on an objective standard.”: *R. v. Huddle* (1989), 102 A.R. 144 at para. 9, [1989] A.J. No. 1061 (C.A.).

[22] In this case, Constable Percy relied upon the appellant’s statement that he had asthma. As well, Constable Percy relied on his own personal knowledge that asthma would prevent a person from providing the deep lung air necessary for the breath testing machine and that a mild asthma attack need not involve symptoms such as wheezing or chest heaving.

[23] No authority was cited which has held that the test requires the officer to obtain corroboration of his belief from another source nor was any authority provided which precludes an officer from relying on knowledge gained from personal experiences. As noted by this court in *R. v. Yurechuk*, (1982), 42 A.R. 176 at 178, [1983] 1 W.W.R. 460 (C.A.), the officer is entitled to rely on the circumstances as understood by the officer at the time, even where it has been established later that the officer was under a misapprehension of facts.

[24] In his submissions to this court, counsel for the appellant meticulously parsed selected portions of the reasons of both the trial judge and the summary conviction appeal judge. We are satisfied that the reasons of both the trial judge and the summary conviction appeal judge sufficiently comply with the requirements of *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.

[25] As the Supreme Court of Canada noted in *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499, trial judges deliver oral judgments every day and:

... often limit their reasons to the essential points. It would be wrong to require them to explain in detail the process they followed to reach a verdict. They need only give reasons that the parties can understand and that permit appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, and *R. v. Burns*, [1994] 1 S.C.R. 56.

[26] The trial judge and summary conviction appeal judge did not err in determining that the error message on the machine was of little consequence to the officer's grounds for belief. The breath testing machine was not the only objective basis upon which the officer could conclude the appellant may be incapable of providing a breath sample. He also had the appellant's response that he had asthma and his own knowledge about asthma.

[27] As a result, the summary conviction appeal judge did not err in dismissing the appeal from the trial judge's determination that the peace officer's demand for a blood sample was properly pursuant to section 254(3)(b).

Issue 2: Whether or not, under all the circumstances of this case, (a) there was a violation of section 8 of the *Canadian Charter of Rights and Freedoms* in consequence of any inadequacy in the legal basis for the officer's demand pursuant to section 254(3)(b) of the *Criminal Code* and (b) whether or not there should be exclusion of evidence pursuant to section 24(2) of the *Charter* as a result of the alleged infringement under section 8 of the *Charter*?

[28] In light of our decision herein, we need not deal with this ground of appeal.

VIII. Conclusion

[29] The appeal is dismissed.

Appeal heard on October 2, 2009

Memorandum filed at Edmonton, Alberta
this 21st day of October, 2009

Authorized to sign for: Picard J.A.

Ritter J.A.

McDonald J.A.

Appearances:

D.C. Marriott
for the Respondent

R.S. Prithipaul
for the Applicant