

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

- and -

FITZROY SIMPSON

Before Justice P.A. Schreck
Heard on February 21, 2017

REASONS FOR JUDGMENT

E. Beaton counsel for the Crown
H. Spence counsel for Fitzroy Simpson

SCHRECK J.:

[1] When Fitzroy Simpson was arrested for impaired driving, the arresting officer failed to immediately advise him of his right to counsel, preferring instead to leave Mr. Simpson in his police cruiser while he searched for Mr. Simpson's identification and seized an item from his vehicle. The officer explained that he did not believe that his decision to put off advising Mr. Simpson of his right to counsel would "determine . . . the outcome of a criminal trial". As it turns out, he was mistaken.

[2] Mr. Simpson was charged with driving while impaired (Count 1) and while the concentration of alcohol in his blood exceeded the legal limit (Count 2). For the reasons that follow, I have concluded that the officer's failure to immediately advise Mr. Simpson of his right to counsel constituted a serious breach of his s. 10(b) *Charter* rights warranting exclusion of the breath test results. As a result, Count 2 is dismissed. I am,

however, satisfied beyond a reasonable doubt that Mr. Simpson operated a motor vehicle while his ability to do so was impaired by alcohol. He is accordingly found guilty on Count 1.

I. EVIDENCE

A. Events Leading Up to the Arrest

[3] At around 12:50 a.m. on March 13, 2016, Bhamu Mallick was driving with his wife and daughter when he saw a grey Infiniti driving in the same direction. The driver of the Infiniti was “not driving properly”. He was travelling significantly below the speed limit and was frequently swerving between lanes without signalling. At one point, he almost caused an accident by driving too close to Mr. Mallick’s van, almost hitting it. As a result, Mr. Mallick called 911.

[4] Mr. Mallick observed the police arrive and stop the Infiniti. He purported to be able to identify Mr. Simpson in court as the person who had been driving the Infiniti.

[5] In cross-examination, Mr. Mallick agreed that he felt that it was his job “to tell the court that this guy did something wrong” and to assist the prosecution. He also agreed that he wanted to see the defendant convicted. He also appeared to agree that “there might be a tendency to . . . give answers that are . . . more detailed or more full than you recall”.

[6] Cst. Joseph Crouse, who had been a Peel police officer since 2003, responded to the 911 call. He was in the area and saw a minivan and a grey Infiniti. The Infiniti was swerving within its lane. Cst. Crouse activated his emergency lights and at 1:12 a.m. effected a traffic stop.

[7] Cst. Crouse approached the Infiniti and knocked on the window. He saw the driver, who was later identified as Mr. Simpson, fumble with the button that opened the window. When he opened the window, Cst. Crouse detected a strong odour of an alcoholic beverage. He directed Mr. Simpson to exit the vehicle. Mr. Simpson did so, but was very unsteady on his feet. He also appeared to be drowsy.

B. The Arrest

[8] At 1:14 a.m., Cst. Crouse arrested Mr. Simpson for operating a motor vehicle while his ability to do so was impaired. He handcuffed Mr. Simpson, escorted him to his police cruiser, subjected him to a pat-down search and then placed him in the back of the cruiser.

[9] Cst. Crouse then returned to Mr. Simpson’s vehicle to look for his identification, which Mr. Simpson told him was in the centre console. By this time, another officer had arrived on scene and was speaking to Mr. Mallick. In addition to the identification, Cst.

Crouse also seized another item, the nature of which was not specified in the evidence heard at trial.

C. Right to Counsel

[10] At 1:21 a.m., Cst. Crouse returned to the police cruiser and advised Mr. Simpson of his right to counsel for the first time. Cst. Crouse was asked in cross-examination about his decision to return to Mr. Simpson's vehicle to obtain his identification before advising him of his right to counsel:

Q. Okay. And you understand, though, somebody's rights and the breath demand should take priority over more administrative tasks?

A. I think the amount of time that it took me to go ahead and get that wallet, that it – it wouldn't determine, you know, the outcome of a criminal trial, is my opinion and based on my experience.

Q. Okay. So you felt going to the vehicle and searching the vehicle and finding the wallet wouldn't be noteworthy in a criminal trial?

A. How do you mean not noteworthy?

Q. Okay. So you made an assessment that this isn't going to be make or break to the case so you're not going to worry about it?

A. No, I felt I had enough time to go ahead and do that.

[11] Later in his cross-examination, Cst. Crouse disagreed with the suggestion that he should have read Mr. Simpson his rights to counsel first.

[12] When asked whether he wished to speak to a lawyer, Mr. Simpson replied that he wished to speak to a Peter McDonald and provided Cst. Crouse with Mr. McDonald's telephone number.

[13] Cst. Crouse transported Mr. Simpson to a police station, arriving there at 1:31 a.m. He attempted to contact Mr. McDonald but was unsuccessful in doing so. He could not recall whether he left a voicemail message. He then called duty counsel, who spoke to Mr. Simpson.

[14] In cross-examination, Cst. Crouse acknowledged that he had a disciplinary history that included findings of having neglected his duty by failing to make proper notes, discreditable conduct, and insubordination and had been suspended from his

duties for 14 months in 2011. After he returned to duty, he was suspended again for “a couple of months”.

D. The Qualified Breath Technician

[15] Cst. Douglas Holmes, who has been a police officer for 33 years and a breath technician for 26, took custody of Mr. Simpson at 3:08 a.m. He confirmed with Mr. Simpson that he had spoken to duty counsel but that he still wished to speak to Mr. McDonald. Cst. Holmes told Mr. Simpson that he would wait about half an hour for Mr. McDonald to call back, but expected that he probably would not. He then Mr. Simpson that all lawyers “went to the same law schools” and therefore the advice given by any of them would probably be the same.

[16] Mr. Simpson told Cst. Holmes that he took sleeping pills every day and that he had taken one at 10:00 p.m. He explained that he was on his way home and he hoped that the sleeping pill would “kick in” by the time he got there. He denied ever having been warned by his doctor that he should not drive after taking the sleeping pills, nor was there any such warning on the label. He agreed with Cst. Holmes that taking the pill and consuming alcohol were probably “not the best idea”.

[17] Mr. Simpson told Cst. Holmes that his destination was near Jane Street and Steeles Avenue in Toronto, which was in the opposite direction to that which he was travelling when first stopped.

[18] Mr. Simpson provided two breath samples, resulting in readings of 167 and 159 mg. of alcohol per 100 ml. of blood. The testing procedure was video recorded. On the video, Mr. Simpson is seen dozing between the tests.

[19] Cst. Holmes testified that in his opinion, Mr. Simpson’s ability to operate a motor vehicle was obviously impaired.

II. ANALYSIS

A. The *Charter* Applications

(i) Sections 8 and 9 of the Charter

[20] Mr. Simpson submits that the Cst. Crouse did not have reasonable and probable grounds to arrest him. As a result, the arrest violated his s. 9 *Charter* right against arbitrary arrest and the subsequent breath demand violated his s. 8 right against unreasonable search and seizure. Counsel points out that the time between the radio call and the arrest was only two minutes and submits that this was insufficient time for the formation of proper grounds.

[21] It is well established that the standard for an arrest for impaired driving and a subsequent breath demand is not an onerous one. There need only be grounds to

believe that the defendant's ability to operate a motor vehicle was at least slightly impaired: *R. v. Bush*, 2010 ONCA 554 at paras. 46-48. In this case, Cst. Crouse relied on the following:

- The radio call about a suspected impaired driver.
- The observation of Mr. Simpson swerving within his lane.
- Mr. Simpson's fumbling with the window control.
- The odour of an alcoholic beverage.
- Mr. Simpson's unsteadiness on his feet.
- The fact that he appeared to be drowsy or sleepy.

In my view, this constellation of factors was sufficient to justify the arrest and subsequent breath demand. While the time between the call and the arrest was relatively brief, it was sufficient for the officer to make the observations that he did.

[22] While Cst. Crouse's disciplinary history is troubling, his credibility with respect to his observations were not challenged in cross-examination and I accept his testimony on this point.

(ii) *Section 10(b) of the Charter*

[23] Section 10(b) of the *Charter* provides that upon arrest or detention, individuals must be advised of their right to retain and instruct counsel "without delay". The meaning of the term "without delay" was explained by the Supreme Court of Canada over seven years ago in *R. v. Suberu*, 2009 SCC 33 at para. 42:

To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

[24] In this case, Cst. Crouse did not advise Mr. Simpson of his right to counsel immediately. He chose instead to look for Mr. Simpson's identification and then seize

some unspecified object from his vehicle. Crown counsel concedes that this was a violation of s. 10(b). She was correct to do so.

(iii) *Section 24(2) of the Charter*

[25] As I have recently discussed elsewhere, for some time the Peel Regional Police appear to have had significant difficulty understanding and applying the immediacy requirement in s. 10(b): *R. v. Sandhu*, 2017 ONCJ 226 at paras. 9-11. See also *R. v. Lima*, 2017 ONSC 2224 at paras. 36-37; *R. v. Athwal*, 2017 ONSC 26 at para. 230; *R. v. Kraus*, 2015 ONSC 2769 at paras. 36-37; *R. v. Moulton*, 2015 ONSC 1047 at paras. 86-89; *R. v. Grewal*, 2015 ONCJ 691 at paras. 41-44; *R. v. Medeiros*, 2015 ONCJ 707 at para. 30; *R. v. Singh*, 2015 ONCJ 643 at para. 39; *R. v. Ahmad*, 2015, ONCJ 620 at paras. 15-19; *R. v. Lam*, 2014 ONSC 3538 at para. 230; *R. v. Soomal*, 2014 ONCJ 220 at para. 39; *R. v. Ramocan*, 2014 ONCJ 692 at para. 66; *R. v. Volkov*, [2014] O.J. No. 5346 (C.J.) at para. 25; *R. v. Thomson*, 2013 ONSC 1527 at paras. 137-140; *R. v. Godday*, 2013 ONSC 1298 at para. 86; *R. v. Thompson*, [2013] O.J. No. 3570 (C.J.) at para. 5; *R. v. Dinh*, 2011 ONSC 5644 at para. 48; *R. v. Watson*, 2010 ONSC 448 at para. 109.

[26] As in *Sandhu*, I find that the systemic nature of this problem renders the breach sufficiently serious that notwithstanding its moderate impact on Mr. Simpson's *Charter*-protected interests and notwithstanding society's interest in an adjudication on the merits, exclusion of the evidence is required to maintain the long-term repute of the administration of justice. It is simply unacceptable for the police to repeatedly ignore a well-established duty imposed on them by the *Charter*, as the Peel police have done with respect to the immediacy requirement in s. 10(b). As a result, the breath test results and Mr. Simpson's statements during the testing procedure are excluded.

[27] I would add that although it was not argued to be a separate *Charter* violation, I am somewhat troubled by Cst. Holmes telling Mr. Simpson that all lawyers "went to the same law schools" and would therefore give the same advice. The suggestion that all lawyers are essentially interchangeable has the potential to undermine an accused's right to counsel of choice.

[28] There being no admissible evidence of Mr. Simpson's blood alcohol concentration, Count 2 is dismissed.

B. Impaired Driving

[29] The Crown bears the onus of establishing that Mr. Simpson's ability to operate a motor vehicle was impaired at the relevant time. Impairment is generally understood as meaning that an individual's judgment is altered and his or her physical abilities, such as coordination or reaction time, are reduced. Evidence which establishes any degree of impairment from slight to great is sufficient to establish this element of the offence: *R. v. Stellato* (1993), 12 O.R. (3d) 90 (C.A.), *aff'd* [1994] 2 S.C.R. 478.

[30] In this case, the Crown relies on the observations of Mr. Mallick and Cst. Crouse. There is reason to exercise caution with respect to both witnesses. Mr. Mallick acknowledged that he believed that his job was to assist the prosecution and that this may have affected his evidence. However, Mr. Simpson's driving was clearly concerning enough that Mr. Mallick thought it necessary to call 911. Even if he did exaggerate somewhat, I find that he did observe erratic and unsafe driving on the part of Mr. Simpson.

[31] With respect to Cst. Crouse, as mentioned earlier his disciplinary history is a cause for concern. However, his testimony respecting the indicia of impairment was not seriously challenged and I find that his evidence on this point is reliable.

[32] Based on the evidence of Mr. Mallick and Cst. Crouse, I find that Mr. Simpson was driving below the speed limit, was swerving within or between lanes, almost struck Mr. Mallick's car, had difficulty opening the window of his car when directed to do so, and was unsteady on his feet when he exited the vehicle. Based on this evidence, I am satisfied beyond a reasonable doubt that Mr. Simpson's ability to operate a motor vehicle was at least slightly impaired. While there was some evidence that Mr. Simpson had taken sleeping pills, the odour of an alcoholic beverage which Cst. Crouse noticed satisfies me beyond a reasonable doubt that alcohol consumption was at least a contributing factor to the impairment: *R. v. Thompson*, 2015 ONCJ 705 at para. 58; *R. v. Bartello*, [1997] O.J. No. 2226 at para. 2.

III. DISPOSITION

[33] For the foregoing reasons, Mr. Simpson is found guilty on Count 1. Count 2 is dismissed.

Justice P.A. Schreck

Released: May 18, 2017.