

☐ **R. v. Soto, 2009 ONCJ 326**

**ONTARIO COURT OF JUSTICE
BETWEEN:**

HER MAJESTY THE QUEEN

— AND —

FRANCISCO SOTO

Before Justice K.N.Barnes

**J. HAROWITZ
for the Crown
K. R. BYERS
for the Accused**

BARNES J.:

[1] Mr. Francisco Soto is charged that on November 16, 2007, he had care and control of his motor vehicle while his ability to drive was impaired by alcohol and also that he had care and control of his motor vehicle while his blood alcohol concentration exceeded the legal limit. The offences are alleged to have been committed in the city of Toronto.

[2] At 3.07a.m on November 16, 2007, Constable Saunders of the Toronto Police Service was informed by police dispatch of a single motor collision on the ramp of the Fred Gardiner Expressway. Constable Saunders arrived on scene at 3.11a.m. and saw the vehicle. It appeared to have been driven into a concrete barrier. He observed substantial damage to the side of the vehicle.

[3] Mr. Soto was standing directly in front of and ten feet away from the vehicle. There was a tow truck on scene. Constable Thomas Chfskey also received the same call from police dispatch and arrived on scene immediately after Constable Saunders.

[4] At the police station breathalyser tests were conducted. The first breath test took place at 4.26a.m; the second test at 4.48a.m, the test results were 115 and 108 milligrams of alcohol respectively all in 100 millimetres of blood. As a result of his interaction with the police, Mr. Soto was charged with the offences described.

[5] No witnesses to the accident were proffered at trial. Constable Saunders received the police radio call about the collision at 3.07am. He was on scene, four minutes later, at 3.11a.m. There was already a tow truck on scene. I conclude that the accident occurred a short time prior to 3.07a.m.

[6] Mr. Soto has raised two issues:

- (i) That Constable Saunders did not have reasonable and probable grounds to make a breath demand pursuant to section 254(3) of the Criminal Code;
- (ii) That he was not in care and control of his motor vehicle when the officer arrived on scene;

REASONABLE AND PROBABLE GROUNDS

[7] Section 254 (3) of the Criminal Code authorizes a peace officer to make a demand that a person provide a breath sample for testing:

“Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding two hours[1] has committed, as a result of the consumption of alcohol, an offence under section 253 [impaired driving], 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 thereafter as is practicable

(a) such samples of the person's breath as in the opinion of a qualified technician...

...are necessary to enable 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.

[8] Section 254(3) of the Code requires that the officer's reasonable and probable grounds be based on an honestly held belief and there must be an objective basis for this belief. R. v. Bernshaw, 1995 CanLII 150 (S.C.C.), [1995] 1 S.C.R. 254, para. 48. The grounds must be based on facts known to the officer at the time he formed the belief. R v. Maxwell[2004] O.J. No.3343 at para.23 (C.J.). Judicial assessment of the officer's grounds should focus on the totality of the circumstances known to the officer at the time he formed the belief. R v Oduneye, [1995]A.J.no.632 at para. 20 (C.A.), leave dismissed [1995]S.C.C.A. No. 49.

[9] At 3.16a.m, Constable Saunders concluded that he had the requisite reasonable and probable grounds to arrest Mr. Soto and arrested him. At 3.18 am, he read Mr. Soto his rights to counsel and the requisite cautions and at 3.23a.m, read Mr. Soto the Section 254(3) demand. The Constable relied on the following to make the demand:

- (i) The Constable received a call, about a vehicle collision, from police dispatch at 3.07 a.m. and arrived on scene at 3.11a.m;
- (ii) He detected an odour of alcohol emanating from Mr. Soto's breath and concluded that Mr. Soto had alcohol in his body;
- (iii) He observed Mr. Soto to have red eyes;
- (iv) Mr. Soto informed him that he lost control as he drove on the ramp and estimated his speed at 100km/hr. The officer concluded that Mr. Soto ran his car into the concrete barrier;
- (v) Constable Saunders concluded that the highway was a little wet but assessed the road conditions to be nothing out of the ordinary;
- (vi) The Constable noted nothing unusual about Mr. Soto's speech or gait and Mr. Soto's answers were responsive to the officer's questions;
- (vii) Mr. Soto was standing 10 feet away and directly in front of the vehicle, there was no one else in the vicinity of the vehicle.

[10] It is submitted on behalf of Mr. Soto that Constable Saunders “jumped the gun” and that within the context of all these observations, the only reasonable conclusion that could be reached was that Constable Saunders had nothing more than a reasonable suspicion that an offence under Section 253 of the Code had been committed. It is further submitted that under these circumstances, it was

imperative that the officer make a demand to test Mr. Soto's breath with an approved screening device pursuant to section 254(2) and in the absence of such a test, the officer's grounds did not meet the statutory prerequisite of reasonable and probable grounds for a section 254(3) demand.

[11] I do not accept this submission, while I agree that the fact of the accident on its own or the other indicia when considered on their own, fall far short of the statutory prerequisite of reasonable and probable grounds, I reach a different conclusion when I consider the cumulative impact of all the factors known to the officer at the time he made his observations, the circumstances surrounding the accident being but one factor. *Rv. Phyason*, [2007] S.C.J. No. 39 at para. 18. In the result, I conclude that Constable Saunders's belief was honestly held and objective in all the circumstances.

[12] The defence also submits that there is no evidence before the court that the Constable concluded that Mr. Soto had committed a section 253 offence within the preceding three hours, thus this statutory precondition has not been met. This time period refers to the period immediately preceding when the officer formed his belief. *R v. Pavel*, [1989] O.J. No. 2307 (C.A.); *R v. Hitchner* (1989) A.J. No. 106 (Alta.C.A). It is not necessary for a peace officer to recite the magic words of the statute. It is proper for the court to infer from all the evidence that the officer had the requisite belief even if the officer does not use the "magic words". *R v. Clarke* [2000] O.J. No. 804 at para. 13 (S.C.J.)

[13] In the context of all the circumstances known to the officer, it is illogical to conclude that Constable Saunders did not turn his mind to a consideration of whether a section 253 offence had been committed within the preceding three hours. When the totality of the circumstances known to him is considered, the only reasonable inference is that he did turn his mind to this issue. In view of my conclusion that Constable Saunders's conclusion were honestly held and objectively reasonable in all the circumstances, I find no Charter breach and the test results are admissible.

CARE AND CONTROL

[14] Mr. Soto was not found in the driver's seat of his motor vehicle therefore the presumption under section 258(1) (a) does not apply. Since the presumption has been rebutted the court must examine all the circumstances to determine whether Mr. Soto was in de facto care and control.

[15] According to current appellate authorities, in such circumstances, the issue of care and control is to be resolved by conducting a risk analysis of the accused's actual or potential conduct in relation to the motor vehicle and the actual or potential danger that may arise from such conduct. *Ford v The Queen* [*1982 CanLII 16 \(S.C.C.\)*](#), (1985), 65 C.C.C. (2d) 392 (S.C.C.); *R. v. Toews* (1985), 1 C.C.C. (3d) 24 (S.C.C.); *Saunders v The Queen* [1967] 3 C.C.C. 278 (S.C.C.); *R v. Wren* [2000] O.J. No. 756. In *Wren supra* at para. 27, Feldman J.A. described the test as follows:

"In order to establish care and control of a motor vehicle, the act or conduct of the accused in relation to that motor vehicle must be such that there is created a risk of danger, whether from putting the car in motion or in some other way."

[16] I find the testimony of Constables Saunders and Thomas Chfskey to be consistent in all respects. I accept their testimony and make findings of fact accordingly. From the evidence I make the following findings of fact:

- (i) The Constables received the call from dispatch at 3.07a.m and arrived on scene at 3.11a.m;
- (ii) Mr. Soto had driven his motor vehicle into a concrete barrier on a highway entry ramp. Mr Soto was standing ten feet away from the vehicle. There was no one else or any other vehicles on scene except tow trucks;
- (iii) Mr. Soto's vehicle was blocking the left lane of traffic. It was not on the shoulder of the roadway. The vehicle was located on an elevated road ramp going uphill;
- (iv) Based on the damage he observed, Constable Saunders concluded that the vehicle was rendered inoperable. An airbag in the vehicle had been deployed. Despite the damage it was possible to engage the wheels of the vehicle and tow it away.
- (v) The keys to the vehicle were observed by Constable Thomas Chfskey to be in the ignition;

(vi) Due to the fact that the vehicle was positioned on an incline it was possible to set it in motion and have it roll down the ramp. This action could pose a danger.

[17] Constable Saunders testified that it was his opinion that based on the extent of the damage the vehicle was rendered inoperable. Constable Thomas Chelsky testified that he observed the vehicle being towed away by a tow truck and concluded that it was possible for the vehicle to roll down the ramp. Neither police officer examined the vehicle closely to determine its immobility or inoperability.

[18] In *R v. Pharai* [2007] O.J. No. 4137 at para 13, Justice Brewer provides a useful summary of the authorities, on care and control, where a vehicle is found to be inoperable or immobile:

“The inoperability or immobility of an automobile is not determinative of whether an accused person is in care or control. As noted in *R. v. Wren, supra*, “an accused will have care or control of an inoperative vehicle, if that vehicle in the hands of an impaired person has the potential to create some danger”. Potential dangers arising from the combination of an intoxicated person and an immobile automobile have been found to arise in circumstances where:

- efforts are made or arrangements have been put in place to extricate the vehicle and potentially return it to a driveable state, such as by summoning a tow truck or seeking assistance from others: see *R. v. Magagna* 2003 CanLII 655 (ON C.A.), (2003), 173 C.C.C. (3d) 188 (Ont. C.A.); *R. v. Wilford*, [2004] O.J. No. 258 (C.A.); *R. v. MacMillan*, [2005] O.J. No. 1905 (C.A.); *R. v. McBrine*, [2007] O.J. No. 142 (C.A.);
- there was an intentional use of the car's equipment, as in *R. v. Johal*, [1998] O.J. No. 1223 (S.C.), where the accused assisted in removing his car from a ditch by steering and accelerating it as it was being towed; and
- there was a realistic risk of an unintentional use of the fittings of the automobile, as in *R. v. Vansickle*, [1990] O.J. No. 3235 (C.A.), aff'd [1988] O.J. No. 2935 (Dist. Ct.) where there was a likelihood that the accused might inadvertently turn off the headlights of a vehicle that was stuck in the middle of a road during white-out storm conditions.”

[19] In *R v. Banks* [2008] O.J.No. 5503; aff'd [2009] ONCA 482, Constance Banks was found to be in care and control when she called a tow truck to extricate her motor vehicle which was stuck in a five feet ditch. When the police arrived she was standing outside her vehicle waiting for the tow truck to arrive. Ms Banks testified that it was her intention to go home but she assumed that her vehicle was probably damaged and that she would need help getting home. Pugsley J concluded at para31:

“ Ms. Banks, as already stated, was at her motor vehicle and starting the process of having her undamaged and operable vehicle extracted from the ditch. I find therefore that the defendant still retained the care or control of her vehicle and that the Crown has indeed demonstrated that there was a risk that upon her vehicle being pulled from the ditch, Ms. Banks would continue her interrupted journey home. I conclude that as stated in *R v. Wren* this risk was a risk of the defendant causing a danger which the section is designed to prevent. I find on these facts the defendant was in care and control of her vehicle at 1.00a .m when Officer McGuire attended upon the scene...”

[20] In this case, it is unclear who called the tow truck operators. Constable Saunders testified that there was a tow truck already on scene when he arrived. Constable Thomas Chelsky arrived immediately after Constable Saunders and he testified that there were already three tow trucks present. Neither counsel asked the police witnesses who called the tow truck drivers. Unlike in *Banks* it is unclear what action Mr. Soto took with respect to his vehicle.

[21] These facts are similar to those in *Wilford* where the defendant was located beside his vehicle that had just been driven into a ditch with the car keys in the ignition. While the police were on scene a tow truck arrived to pull his vehicle out. Mr. Wilford produced documentation indicating that his father was the owner of the vehicle. In *Wilford*, Sharpe JA, concluded that Mr. Wilford's actions in relation to his vehicle, presumably utilising the tow truck, to extricate his vehicle created the significant risk of danger contemplated in *Wren* and therefore he was in care and control of his vehicle.

[22] The focus in the “risk analysis” is on actual or potential conduct by the accused in relation to the vehicle that can create the danger the statute is designed to protect. This risk must be a realistic one.

[23] Mr. Soto was the driver of the motor vehicle; the keys of the motor vehicle were still in the

ignition. Following Magagna, Wilford, MacMillan, McBrine, and Bank, on the facts of this case, there are two potential ways in which Mr. Soto's conduct in relation to his vehicle can cause the type of danger contemplated by the section, first, there is the risk that if the police had not arrived, he could have utilised the tow trucks operators to determine whether his vehicle was operable and if the vehicle was found to be operable, he could have declined the towing services and driven off in his vehicle.

[24] However, in my view this risk is only a realistic one, if I conclude that it was Mr. Soto who called the tow truck because this will be a clear indication of his intention and an example of an action he had taken in relation to his vehicle, which creates an actual or potential risk of the danger the section was designed to prevent.

[25] Mr. Soto's car keys were still in the ignition, the vehicle was situated on a ramp and on an incline. There exists the risk that Mr. Soto could decide to move his vehicle causing it to roll down the incline thus causing the danger the section is designed to prevent, however, if it was in fact Mr. Soto who called the tow trucks then it is absurd to conclude, absent some fanciful speculation, that he would have then proceeded to roll his vehicle down the ramp.

[26] The evidence reveals that the tow trucks were already on scene when the police arrived however, there is gap in the evidence as to who in fact requested the tow trucks and on the facts of this case, this is significant because it helps inform the analysis of whether the risk of the potential conduct by Mr. Soto in relation to his vehicle is a realistic one or if it is the product of some fanciful imagination. As a result of this gap in the evidence, I am left in a reasonable doubt as to whether Mr. Soto's conduct in relation to his vehicle is sufficient to satisfy the care and control test articulated in Wren and conclude that he was not in care and control of his motor vehicle. Having come to this conclusion I must acquit Mr. Soto of all his criminal code charges.

HIGHWAY TRAFFIC ACT

[27] During his interaction with Constable Saunders, Mr. Soto provided the officer with a driver's licence that had expired. This evidence is uncontested. Mr. Soto is also charged with an offence under section 32(1) Highway Traffic Act of Ontario, which prohibits driving a motor vehicle in Ontario without holding a driver's licence issued under the Highway Traffic Act.

[28] The information particularizes the offence as having taken place at 3.16 am. The evidence reveals that Constable Saunders arrived on scene at 3.07am and arrested Mr. Soto at 3.16a.m. Just prior to his arrest, Mr. Soto provided Constable Saunders with an expired driver's licence. The defence submits that the since the evidence reveals that the expired license was provided just prior to 3.16a.m, the offence as particularized is not made out.

[29] I disagree, the evidence clearly supports the charge as laid. On the specific facts of this case the unquantified variance of a few seconds or minutes is so minor such that it is immaterial and inconsequential. In any event, as long as the information was sworn within the prescribed limitation period, a variance between the time of the offence set out in the information and the evidence is not a material fact: Provincial Offence Act s.35(3)(a). This is not a circumstance in which this very minor variance has misled the accused as to the case he had to meet and hampered his ability to prepare a defence or prejudiced the accused in any way.

[30] The defence submits that the Crown has failed to discharge her evidentiary burden because with the exception of the arresting officer's uncontested evidence, that Mr. Soto provided him with an expired licence, the Crown failed to provide any evidence from the Ministry of Transportation to prove that Mr. Soto's licence had expired. It is accurate that such evidence would have helped the Crown to buttress its case, however, in view of the fact that the Crown's evidence on this point is uncontested, I am satisfied that the Crown has proved this fact beyond a reasonable doubt and a guilty verdict is rendered.

[1] In July 2, 2008, s. 254(3) was amended to change the requirement that the officer have reasonable and probable grounds that a s. 253 offence had been committed in “the preceding two hours” to “in the preceding three hours”.

by
for the
[Federation of Law Societies of Canada](#)