Citation: *R.* v. *Bonilla*, 2009 YKTC 40

Date: 20090417
Docket: 08-00227
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

GUILLERMO JESUS BONILLA

Appearances:
Kevin Komosky — Counsel for Crown
Edward Horembala — Counsel for Defence

RULING ON *VOIR DIRE*

[1] COZENS T.C.J. (Oral): Guillermo Bonilla has been charged with having committed the offences of driving while his blood alcohol level was in excess of .08 milligrams of alcohol in 100 millilitres of blood, and impaired driving, contrary to s.s. 253(b) and 253(a) of the *Criminal Code*.

Overview

[2] On June 24, 2008, Constable Graham Belak, while on routine patrol, pulled over a motor vehicle being driven by Mr. Bonilla based upon Constable Belak's observations of the driving pattern of the vehicle. Mr. Bonilla was given a s. 254(2) demand for a breath sample into an approved screening device ("ASD"). The breath sample

provided by Mr. Bonilla resulted in a fail and he was then given the s. 254(3) demand to provide a breath sample into the breathalyzer machine at the RCMP detachment. Mr. Bonilla provided breath samples at the RCMP detachment of 170 and 160 milligram percentile.

Issues

[3] Mr. Bonilla is alleging that his constitutionally protected rights under s. 8 of the *Charter* were violated by Constable Belak and asking that the evidence of the breathalyzer results be excluded from the evidence at the trial. The main thrust of defence counsel's argument is that Constable Belak did not turn his attention to whether there was any reason for him to wait 15 minutes before requiring Mr. Bonilla to provide a sample of his breath into the ASD. Therefore, he was unable to rely on the fail result of the breath sample, and without the fail result of the ASD, there were insufficient grounds to believe that Mr. Bonilla's ability to operate a motor vehicle was impaired by alcohol. Therefore the s. 254(3) demand was without lawful authority.

The Evidence on the *Voir Dire*

[4] At the commencement of the trial a *voir dire* was entered into. The sole witness on the *voir dire* was Constable Belak. Constable Belak's evidence was that on June 24, 2008, at approximately 2:35 a.m., he was parked in his marked police cruiser in front of F.H. Collins High School in the Riverdale subdivision of Whitehorse. He was concluding a call unrelated to Mr. Bonilla.

[5] As Constable Belak turned left onto Lewes Boulevard to head back towards the RCMP detachment in the downtown area, he observed a vehicle heading towards

downtown. Constable Belak entered Lewes Boulevard immediately behind this vehicle just a short distance before reaching the bridge from Riverdale into the downtown area. Constable Belak was not intentionally following this vehicle at this time.

[6] As this vehicle exited the bridge, Constable Belak observed what he called “an unusual driving pattern.” He testified that the lane from the bridge becomes the left hand or inside northbound lane. He stated that the vehicle straddled the centre of the two northbound lanes for a full block, although he admitted that his notes, Report to Crown Counsel and *Motor Vehicles Act* R.S.Y. 2002, c. 153, roadside suspension documentation only mentioned that the vehicle “crossed the centre line.”

[7] Constable Belak described the vehicle as then drifting to the right, almost striking the curb by the optometrist’s building at Lambert Street, before being jerked to the left. The vehicle then drifted back to the centre of the two northbound lanes before drifting back to the right again, almost hitting the curb close to Elliott Street, which is approximately one block past Lambert Street. The vehicle then drifted left back into the right-hand northbound curb lane.

[8] Constable Belak testified that while his notes only record that the vehicle was “wandering in lane and cross centre line after bridge” and do not mention that the vehicle almost twice struck the curb, that “wandering” captures the curb incidents and straddling of the centre line as well.

[9] Constable Belak continued to follow the vehicle for approximately nine more blocks and three sets of lights. He observed no unusual driving during these nine blocks. He stated that he may have been running the vehicle’s plates for the 30

seconds or so that elapsed in these nine blocks. He stated that if there had been vehicles or pedestrians on the road he would not have waited so long before pulling the vehicle over.

[10] At 2:45 a.m. Constable Belak activated the police cruiser emergency lights. In response the vehicle pulled over in front of Tim Hortons and Pizza Hut, about one and a half blocks north of Ogilvie Street. Constable Belak testified that he activated the emergency lights and pulled the vehicle over because he suspected that the driver was impaired or that something was wrong.

[11] When Constable Belak approached the vehicle he observed the driver, subsequently identified as Mr. Bonilla, and a passenger seated beside him. Mr. Bonilla produced his driver's licence, insurance and vehicle registration without problem. Constable Belak noted Mr. Bonilla's eyes to be red and glassy and he could smell liquor on Mr. Bonilla's breath as he spoke to him through the window of the vehicle.

[12] When asked whether he had been drinking, Mr. Bonilla told Constable Belak in a normal voice that he had consumed alcohol prior to driving. This exchange was also recorded in a separate place in Constable Belak's Report to Crown Counsel as Mr. Bonilla responding to a question from Constable Belak as to whether he had been drinking alcohol prior to driving by then stating that he had "had a few."

[13] Constable Belak suspected that Mr. Bonilla had consumed alcohol due to the unsafe driving pattern, glassy and bloodshot eyes, and the odour of liquor on Mr. Bonilla's breath. As a result, at 2:49 a.m., Constable Belak made a demand of Mr. Bonilla that he provide a sample of his breath into a roadside screening device. Mr.

Bonilla complied with the demand and produced a sample at 2:53 a.m. which resulted in a fail reading. Constable Belak testified that the fail result meant that Mr. Bonilla's blood alcohol level was 100 milligram percentile. He further testified that he felt he could rely on the accuracy of the ASD test result.

[14] Constable Belak then formed the opinion that Mr. Bonilla's ability to operate a motor vehicle was impaired by alcohol and as a result, at 2:55 a.m., made the s. 254(3) demand to Mr. Bonilla that he accompany him to the RCMP detachment to provide samples into the breathalyzer. As indicated earlier, Mr. Bonilla provided breath samples which registered 170 and 160 milligram percentile.

[15] In cross-examination, however, Constable Belak stated that he formed the opinion that Mr. Bonilla's ability to operate a motor vehicle was impaired by alcohol solely on his observations of Mr. Bonilla's driving pattern, his glassy and bloodshot eyes, and the odour of liquor on Mr. Bonilla's breath. As well, I infer from the evidence that he also considered Mr. Bonilla's admission that he had been drinking.

[16] Constable Belak testified that he had the grounds to make the s. 254(3) demand without relying on the ASD, stating that he "had good grounds to believe before the ASD." He testified that he provided the ASD demand because it just adds more grounds, particularly for borderline cases. He stated that, while he did not need the fail result from the ASD as he already had the requisite grounds, he also used the ASD result in combination with the driving pattern and the other indicia of impairment observed on the person of Mr. Bonilla.

[17] In cross-examination it was established that Constable Belak had been instructed in the use of the ASD in what was at most a one-day course. During this course he learned how to use the ASD and learned about how it works. He testified that he was aware that cigarette smoke and mouth alcohol can affect the operation of the ASD. He testified that he believed it to be a recommendation only that the operator of the ASD wait 12 to 15 minutes before receiving a breath sample into the ASD if there is a reason to believe that mouth alcohol is present in the individual from whom the sample is being sought. A reason to believe exists if the operator observes the driver drinking. He testified that, “We were taught to wait 15 minutes if we saw someone drinking.” He stated that if he observed the individual drinking he would wait 15 minutes before obtaining a breath sample.

[18] Constable Belak stated that a copy of the ASD manual was in the traffic department of the RCMP detachment. He had never read the manual and stated that it was not required that he do so.

[19] Constable Belak agreed that it was approximately two minutes at most from any place in Riverdale to where he first observed the vehicle being driven by Mr. Bonilla, and that he followed the vehicle for perhaps several minutes.

[20] Constable Belak testified that he was not aware of the exact time that bars in Whitehorse close and that he was not in a state of “heightened awareness” as to the possibility of impaired drivers being on the streets after the bars closed.

Positions of Counsel

Defence Counsel

[21] The argument of counsel for Mr. Bonilla is that in order for Constable Belak to have the requisite grounds for the s. 254(3) breath demand, he needed his observation of Mr. Bonilla's driving, the admission of Mr. Bonilla that he had consumed alcohol, the indicia of glassy and bloodshot eyes and the odour of liquor on his breath, and the fail result from the ASD. If the fail result from the ASD cannot be considered, the reasonable and probable grounds to believe Mr. Bonilla had committed a s. 253 offence do not exist.

[22] The fail result should be excluded from consideration because Constable Belak was not properly trained in the use of the ASD. Constable Belak did not know the circumstances when an ASD could provide an inaccurate reading beyond actually observing someone drinking. As a result, Constable Belak had no reasonable basis to believe that he could rely on the results of the ASD as being accurate.

Crown Counsel

[23] Counsel for the Crown submits that Constable Belak had the requisite reasonable and probable grounds to believe that Mr. Bonilla's ability to operate a motor vehicle was impaired by alcohol without relying on the fail result from the ASD. If he did not have sufficient grounds, then he could rely on the ASD result, as he clearly had a suspicion that Mr. Bonilla had consumed alcohol. Further, the fail reading on the ASD test was reliable in the circumstances. There was nothing in the circumstances

which should have required Constable Belak to delay administering the test to allow for any residual mouth alcohol to be eliminated.

Analysis

[24] Was Constable Belak able to rely on the accuracy of the ASD results? Defence counsel relies on the case of ***R***. v. ***Hubbard***, 2005 YKSC 9. In paragraph 23 of ***Hubbard***, the Court reiterated the following principles from the case of ***R***. v. ***Mastromartino*** (2004), 70 O.R. (3d) 540 (Ont. Sup. Ct. Just):

1. Officers making ASD demands must address their minds to whether or not they would be obtaining a reliable reading by administering the test without a brief delay.

2. If officers do not, or reasonably could not, rely on the accuracy of the test results, the results cannot assist in determining whether there are reasonable and probable grounds to arrest.

3. Officers making ASD demands may briefly delay administering the test if, in their opinion, there is credible evidence which causes them to doubt the accuracy of the test result unless the test was briefly delayed.

4. Officers are not required to wait before administering the test in every case where a driver may have been in a bar shortly before being stopped. The mere possibility that a driver has consumed alcohol within 15 minutes before taking the test does not preclude an officer from relying on the accuracy of the screening device.

5. Whether or not officers are required to wait before administering the screening test is determined on a case-by-case analysis, focusing on the officer's belief as to the accuracy of the test results if the tests were administered without delay, and the reasonableness of that belief.

6. The fact the driver is observed leaving a bar is a relevant circumstance in determining whether it was reasonable for the officer to delay the taking of the test in order to obtain an accurate sample. However, officers are not required to ask drivers when they last consumed alcohol.

7. If the officer decides to delay taking the sample and that delay is challenged at trial, the court must decide whether the officer honestly and reasonably felt that an appropriately short delay was necessary to obtain a reliable reading.

8. If the officer decides not to delay taking the sample and that decision is challenged at trial, the court must decide whether the officer honestly and reasonably believed that he could rely on the test if the sample was taken without delay.

[25] The trial justice concluded that in the facts of ***Hubbard***:

> …the circumstances required some consideration of the possibility of recent drinking. The proximity of the bars where Mr. Hubbard was driving, the fact that he had been drinking that evening, the fact that he had just bought beer and the fact that he had a strong odour of mouthwash are all part of the context that the officer had to address in considering whether delay was appropriate. (Paragraph 26)

[26] The trial justice in ***Hubbard*** expressed concerns about the reasonableness of the officer's decision not to wait 15 minutes before administering the ASD and concluded that, when viewed objectively, the officer "could not reasonably conclude that the test was reliable." The trial justice focused on the fact that the officer had no knowledge about the operation of the roadside screening device when there was an issue of mouth alcohol and as such was unable to address his mind as to whether he could rely on the breath result. The officer stated, in the context of providing his understanding of the potential effect of smoking upon the operation of the ASD, that he would wait five minutes if he understood that there was mouthwash or something akin to it in the driver's mouth. As such, the trial justice noted that the officer had incorrect information on the issue. (Paragraphs 28 and 29)

[27] Defence counsel also relies on ***R***. v. ***Polischuk****,* 2003 BCPC 76. The issue in ***Polischuk*** was the effect of the words by the driver that, "I have a dying sister and I've just had a couple of drinks." The trial judge noted that the police officer described the words slightly differently the three times the police officer stated what was said.

[28] The police officer did not ask Mr. Polischuk when he had had his last drink and administered the ASD without any further delay. The trial judge in ***Polischuk*** cited ***R***. v. ***Bernshaw***, [1995] 1 S.C.R. 254, and added to the words of Justice Sopinka that:

> Where there is evidence that the police knew *or ought to have known* that the suspect had recently consumed alcohol and expert evidence shows that the subsequent screening test would be unreliable due to the presence of alcohol in the mouth, it cannot be decreed, as a matter of law, that both the subjective and objective tests have been satisfied. (Paragraphs 13 and 16)

[29] In finding that there was a s. 8 *Charter* breach, the trial judge in ***Polischuk*** concluded that the police officer should have clarified what the word "just" meant as to whether it referred to the quantity of alcohol consumed or the time the alcohol was consumed. The trial judge also relied upon evidence that Mr. Polischuk's vehicle was parked in front of a residence within the 10 to 15 minute timeframe prior to the ASD being administered, although noting there was no evidence as to what Mr. Polischuk was or was not doing in the residence. ***Polischuk*** was followed in ***R***. v. ***Tillotson****,* 2008 BCPC 136, although the trial judge in ***Tillotson****,* in finding that there was no basis to rely upon the accuracy of the ASD results, preferred to add to Justice Sopinka's wording in ***Bernshaw*** that:

> … "Where there is evidence the police officer knew, *or if he did not ought to have inquired,* whether or not the suspect had recently consumed alcohol…." (emphasis in original)

[30] In ***R***. v. ***Robinson****,* 2008 ONCJ 588, the trial justice, at paragraph 18, considered the reliability of the ASD results in the context of a R.I.D.E. officer not addressing the danger of mouth alcohol and the potential need to delay administering the ASD due to the officer not being aware at all of the effect that mouth alcohol could have on the accuracy of the ASD test results. The officer had been told by Mr. Robinson that he had had a beer earlier.

[31] The trial justice stated that:

> …the first question to be determined is whether the arresting officer failed to address his mind to whether or not he would be obtaining a reliable reading by administering the screening device test without a brief delay. In that regard, the court must determine whether the officer honestly and reasonably believed that he could rely on the test result if the sample was taken without delay, such determination to be made by applying both a subjective and objective standard when considering the circumstances as known to the police officer at the time of the roadside demand. (Paragraph 16)

[32] The trial justice found that the officer was acting honestly in his belief that the screening device test was reliable and reasonably accurate, (Paragraphs 19 and 20) and concluded that the officer had the requisite subjective belief in the reliability of the ASD test results. In considering the objective reasonableness of the officer's belief, the trial justice stated the test as being:

> …would a reasonable person standing in the shoes of this police officer and possessing the same information as this officer when he made his demand for the roadside test, reasonably arrive at the same conclusion as to the reliability of the screening device test result without requiring a brief delay? (Paragraph 21)

[33] The trial justice in ***Robinson*** found that the objective criteria was also satisfied, notwithstanding that the officer did not know what is "a well-known fact that is routinely

acknowledged by police officers who investigate these cases and routinely and consistently accepted by the courts." (Paragraphs 24 and 25)

[34] The trial justice concluded that in the circumstances before him, the reasonable person standing in the shoes of the police officer "should be assumed to know and understand the effects of mouth alcohol upon the reliability of the screening device test results." (Paragraphs 27 to 29)

[35] The trial justice in ***Robinson*** further stated that:

> In accordance with the principles enunciated in *Mastromartino* and *Einarson* [(2004), 183 C.C.C. (3d) 19 (Ont.C.A.)], the reasonable officer making the demand would address his mind to whether or not he would be obtaining a reliable reading by administering the test without a brief delay. (Paragraph 31)

[36] The trial justice found that on the facts and circumstances known to the police officer there was no further obligation to make any further inquiries or to further delay the ASD test. (Paragraph 32)

[37] In ***R***. v. ***Shular,*** 2003 ABPC 172, Norheim J. considered the decision of ***Polischuk***. In ***Shular***, the police officer disbelieved the evidence of Mr. Shular when he stated that he had not consumed any alcohol for two days, particularly given the odour of liquor on his breath. As a result, the officer waited 15 minutes before administering the ASD, which included an approximation of the time it would have taken Mr. Shular to drive from the Boston Pizza location he had been at to where he was observed by the officer. Subsequent to the fail result being obtained on the ASD, a second police officer found open liquor in the vehicle being driven by Mr. Shular. There were passengers in the vehicle. The police officer who administered the ASD

did not question the reliability of the original fail reading and thus did not obtain a second ASD sample from Mr. Shular.

[38] The rationale for requiring a second sample would be to allow 15 minutes from the time Mr. Shular was pulled over and not count the time it would have taken to drive from Boston Pizza, on the basis that Mr. Shular could have been consuming alcohol while driving. The trial judge found that the subsequent information about the open liquor in the vehicle did not make the officer's previous conclusion unreasonable or invalidate the reasonable and probable grounds that the officer formed as a result of the fail reading on the ASD. (Paragraph 9)

[39] The trial judge drew a distinction between instances where subsequent facts arise that may provide an innocent explanation for a factor relied upon for the formation of reasonable grounds in those cases where there is no evidence of the existence of the innocent explanation. Of importance to the trial judge was that there was no evidence that Mr. Shular had been drinking in the vehicle and there was no reason to speculate simply on the basis that there was open liquor in the vehicle that Mr. Shular had been consuming it. (Paragraphs 9 to 11)

[40] ***Polischuk*** was distinguished in ***Shular*** on the basis that Mr. Polischuk had told the police officer that he had "just" had something to drink, which should have been interpreted to mean within 15 minutes. (Paragraph 13)

[41] The trial judge in ***Shular*** also dealt with the defence submission that the ultimate breathalyzer results were unreliable because the police officer did not keep Mr. Shular under constant observation while at the police station. Counsel submitted that allowing

into evidence the results of the test would condone the impropriety of the actions of the police officer in failing to constantly observe Mr. Shular. The trial judge stated that it is the accused who is on trial and not the police officer, and that the actions of the police officer are only significant if they result in non-compliance with the statute or the production of unreliable evidence, neither of which existed.

[42] In upholding the trial judge's decision (see ***R***. v. ***Shular****,* 2004 ABQB 434), the summary conviction appeal court judge stated:

> The investigating officer had information from the appellant that he had recently left a licensed premise some 8 kilometres away from the point where he was stopped. She saw no signs of recent alcohol consumption. The suggestion that open liquor found in the vehicle was indicative of recent consumption is merely speculative. Courts act on evidence that can be accepted in good conscience and not on ethereal conjecture. (Paragraph 8)

[43] And finally, the case of ***R***. v. ***Szybunka****,* (2005) ABCA 422, stands for the proposition that there is no obligation on a police officer to ask a driver when he or she had their last drink, in the absence of credible evidence that might have caused the officer to suspect that the driver may have consumed alcohol in the previous 15 minutes. (Paragraphs 7 and 8)

[44] In ***Szybunka*** the police officer observed Mr. Szybunka's vehicle leaving the parking lot of a bar. The court held that:

> The actions of a suspect prior to departure from the bar may well be the subject of conjecture and speculation, but if not borne out by credible, cogent evidence, constitutes an uncertain foundation to contend that the constable knew, or ought to have known, that the screening tests would be unreliable.

An exception to this was noted to be where there is evidence of actual knowledge of, or wilful blindness to, the proposition the test to be administered might be unreliable. (Paragraph 9)

[45] In sum, all of the above cases can be read as standing for the proposition that the decision made by a police officer to wait 15 minutes or otherwise not to wait prior to administering the ASD, needs to be made on a reasonable assessment of the totality of the circumstances known to the officer at the time. The reviewing court will look at both the subjective belief of the police officer at the time and the objective reasonableness of that belief.

[46] A police officer is not required to assume, based upon speculation, that a driver may have consumed a drink within 15 minutes of the ASD being administered and thus delay the ASD test. While leaving a bar the odour of liquor on the breath of a driver or the presence of open liquor in a vehicle may well be factors in the police officer's assessment of whether he or she can rely on the ASD results, none of these necessarily require the police officer to make any further inquiries in the absence of credible evidence that these observations were connected to the actual consumption of alcohol by the driver within the 15 minute period.

[47] Any or all of these observations, however, if associated with some other factor, such as a statement by the driver about having just had a drink, observation by the police officer of some movement by the driver akin to taking a drink, or liquid on the face of the driver, may well require the police officer to consider whether the ASD

results would be reliable without a further delay to ensure the requisite 15 minutes had passed since consumption of the last drink of alcohol.

[48] A further point is that the failure of a police officer to adequately know the operational requirements of the ASD and the factors that may contribute to an unreliable result being obtained, do not necessarily undermine the objective reasonableness of the police officer's belief that he or she can rely on the results of the ASD test.

[49] Again, the issue is not what might have been seen or observed or what the answer to a question as to when the last drink was consumed might have been, the issue is what credible evidence exists that should have alerted the police officer to question the reliability of the ASD test results in the absence of a delay to eliminate the mouth alcohol concern. I say should have, because obviously a police officer who has no or a limited understanding of the potential effect of mouth alcohol will not see that an issue exists. But a reviewing court can look at what evidence was available for the police officer's consideration and, from an objective standpoint, decide the reasonableness of the police officer's belief, taking all the available evidence into account.

[50] Absent an application for a judicial stay of proceedings for an abuse of process, a police officer's failures or shortcomings should not affect the outcome of an investigation unless these failures or shortcomings contribute in any meaningful way to unreliable evidence being gathered or to reliable and probative evidence not being gathered.

Application to the facts of this case

[51] It is clear that Constable Belak had an incomplete understanding of the operation of the ASD and the factors that could contribute to an unreliable result being obtained. At best, he knew that residual mouth alcohol could cause a problem and that it was recommended but not required that a 12 to 15 minute wait occur before administering the test. He also understood that the presence of residual mouth alcohol would be a factor for his consideration if he actually saw a driver taking a drink, but not otherwise.

[52] His beliefs do not accord with the instructions in the ASD operational manual. This said, on the evidence, I do not doubt that Constable Belak had a subjective belief that he could rely on the results of Mr. Bonilla's ASD test, as was the case in *Robinson*. Constable Belak's limited knowledge does not automatically mean that the ASD test result can be considered unreliable from an objective standpoint. A failure to be aware of what to look for to ascertain that the ASD test results are reliable does not automatically mean that credible evidence existed that would have been a factor for consideration in the mind of a police officer who knew exactly what to look for.

[53] To say that if Constable Belak had adequately understood the parameters for obtaining a reliable ASD test result he would have delayed administering the ASD test requires credible evidence, not mere speculation or conjecture.

[54] In the case at bar, Mr. Bonilla was not leaving a bar; he was leaving the Riverdale area of Whitehorse. Constable Belak did not associate the address on Mr. Bonilla's licence to the Riverdale subdivision in which Mr. Bonilla lived. Even if he had,

however, what would have resulted? The fact that Mr. Bonilla was at most two minutes away from his residence and possibly from a last drink at this residence does not mean that Constable Belak was required to ask whether Mr. Bonilla had anything to drink at his residence. There was no evidence tendered to indicate that he had been drinking at his residence or taken such a last drink there.

[55] The evidence was that Mr. Bonilla told Constable Belak that he had been drinking prior to driving. Regardless of whether this was in response to a question from Constable Belak as to whether he had been drinking alcohol prior to driving or Mr. Bonilla stating, in response to a question as to whether he had consumed alcohol, that he had “had a few” prior to driving, there is no evidence that Mr. Bonilla had “just” consumed alcohol prior to commencing driving. The evidence is that Mr. Bonilla had consumed alcohol before driving. This evidence did not trigger a requirement that Constable Belak make further inquiries into the time that Mr. Bonilla had consumed his last drink of alcohol. Had Mr. Bonilla stated that he had just had a few drinks or stated that he had finished a drink at his residence before leaving, Constable Belak may well have been required to either investigate further or to delay the ASD test until sufficient time had passed.

[56] The law is clear that a simple admission of prior drinking does not trigger an obligation on a police officer to ask when the last drink had been consumed, absent other factors that may give additional import to the admission. I find that these other factors are not present in this case. The fact that Constable Belak did not look for open liquor in the vehicle does not allow for me to speculate, in the absence of evidence, that if Constable Belak had of known the potential relevance and looked, he would

have found open liquor. Even if he had observed this, it would not have necessarily automatically required him to question Mr. Bonilla as to when he had last consumed alcohol, given that there was a passenger in the vehicle.

[57] In sum, Constable Belak's inadequate knowledge of the use and operation of the ASD and criteria for obtaining reliable test results cannot be said, on the facts of this case, to have caused him to miss any relevant evidence that would have borne on the issue of the reliability of the ASD test result. As such, I find that the fail result on the ASD was reliable and as such could be used by Constable Belak in considering whether there were reasonable and probable grounds to make the s. 254(3) breath demand of Mr. Bonilla, subject to consideration of the application of the ***R***. v. ***Minielly***, 2009 YKTC 9, reasoning to this case, to be discussed later.

[58] This said, I find it disconcerting that a police officer trained in the operation of the ASD apparently had no more than a cursory knowledge of the parameters within which it could be reliably operated. The ASD is an important tool that is commonly utilized in the investigation of impaired driving offences. I would expect that more attention would be given by either Constable Belak or by those training him to ensure that he understood how to properly operate it.

Reasonable and Probable Grounds

[59] I will firstly discuss whether Constable Belak had reasonable and probable grounds to make the s. 254(3) demand absent the fail result of the ASD, and I do so in anticipation of the ***Minielly*** argument.

[60] Crown counsel has argued that even if the ASD test result was excluded from consideration, Constable Belak nonetheless had the reasonable and probable grounds to make the s. 254(3) breathalyzer demand. The Crown bears the burden of establishing on a balance of probabilities that reasonable and probable grounds for Constable Belak's belief existed. In the context of a s. 8 *Charter* argument, defence counsel simply needs to establish that a warrantless search took place before the onus shifts to the Crown to establish the reasonableness of the search. (***R***. v. ***Haas*** (2004) 76 O.R. (3d) 737, Court of Appeal, leave to appeal refused, [2005] S.C.C.A. No. 423.)

[61] What constitutes reasonable and probable grounds is very much dependent on the particular circumstances of the case. There are no uniform criteria of general application that must be marked off in order to reach the necessary threshold. The observations that are made with respect to the presence or absence of any indicia of the consumption of alcohol need to be considered in the particular context of each case. As stated by the Supreme Court of Canada in ***Bernshaw,*** at paragraph 48:

> The existence of reasonable and probable grounds entails both an objective and subjective component. That is, s. 254(3) of the Code requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief: *R*. v. *Callaghan*, [1974] 3 W.W.R. 70 (Sask. Dist. Ct.); *R*. v. *Belnavis*, [1993] O.J. No. 637 (Gen. Div.) (QL); *R*. v. *Richard* (1993), 12 O.R. (3d) 260 (Prov. Div.); and see also *R*. v. *Storrey*, [1990] 1 S.C.R. 241, regarding the requirements for reasonable and probable grounds in the context of an arrest.

[62] In the ***Storrey*** case, Cory J., in considering reasonable and probable grounds for an arrest, stated at page 251:

> In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.

[63] ***Bernshaw*** dealt with the validity of a s. 254(2) demand for a breath sample into an ASD. The observed signs of impairment included erratic driving, the smell of liquor from the driver and an admission of drinking, as well as an observation of the driver having red and glassy eyes. Both Cory J. and Sopinka J. in separate judgments commented that these indicia of impairment could have been a sufficient basis for a s. 254(3) demand. Cory J. at paragraph 38 states as follows:

> The constable, in a commendable manner, wished to have his observations and suspicions confirmed by the ALERT test. It was not unreasonable for him to take this position. However, I would observe that to satisfy himself that he had the reasonable and probable grounds required by s. 254(3) in this case, as well as many other similar situations, the observations of the officer as to signs of impairment may well be sufficient, in themselves, to form the basis for the reasonable and probable grounds required to make the breathalyzer demand.

And at paragraph 77, Sopinka J. says:

> As my colleague Cory J. noted, several potential indicia of impairment were present in this case aside from the evidence provided by the screening test. Constable Mashford testified that he noticed a vehicle exceeding the speed limit and drifting, on two occasions, from the shoulder of the road to the centre and back with the brake lights flickering on and off. As well, upon questioning the respondent, the smell of liquor was detected and the respondent admitted that he had been drinking. Furthermore, Constable Mashford also noticed the respondent's eyes were extremely red and glassy. Based on the foregoing, arguably the

> police officer could have had reasonable and probable grounds to demand a breathalyzer even absent any screening device test results.

Application to this case

[64] It may appear that the observations of Constable Belak are not that different from what may have been sufficient to constitute reasonable and probable grounds for a breathalyzer demand in the opinions of Justices Cory and Sopinka in ***Bernshaw.*** The evidence relied upon as the basis for Constable Belak's s. 254(3) demand, outside of the ASD fail result, was the driving pattern, being the straddling of the centre line, and the two swerves toward the curb and associated drifting or wandering of the vehicle, the glassy and bloodshot eyes, the odour of liquor on Mr. Bonilla's breath and his admission that he had been drinking.

[65] There is no evidence, however, that Mr. Bonilla had any mobility or balance problems, slurred speech, flushed face, soiled or disorderly clothing, behaviour problems and otherwise any noticeable difficulties. He was able to produce the requested documentation to Constable Belak without problem. Mr. Bonilla was not observed to be speeding and he appeared to bring his vehicle to a stop for Constable Belak without concern.

[66] Constable Belak admitted in cross-examination that the glassy and bloodshot eyes could have been as a result of tiredness. Mr. Bonilla drove without any noticeable difficulties for nine blocks and through three traffic lights after the initial observation by Constable Belak of swerving.

[67] Firstly, I am not satisfied that Constable Belak had the necessary subjective belief that he had reasonable and probable grounds to believe that Mr. Bonilla's ability to operate a motor vehicle was impaired by his consumption of alcohol, notwithstanding his testimony during trial that he did.

[68] I consider that his evidence in cross-examination was somewhat suspect when he attempted to explain that "coupled with" did not mean that it was a necessary part of the other indicia observed. The concept of the ASD test being "coupled with" the other indicia of impairment in the context of this case does not logically lend itself to an interpretation that means the two stand separate and distinct. It means that together they form the package.

[69] I have some concern that Constable Belak may well have given his evidence in a way that was intended to circumvent where he believed defence counsel was going in his questioning as to the reliability of the ASD test results. On the other hand, Constable Belak may have simply not appreciated or understood the distinction between observations that give rise to a suspicion, or even high suspicion, of the consumption of alcohol by a driver, and what constitutes reasonable and probable grounds to believe that a s. 253 offence has been committed. I note that this was Constable Belak's fourth or fifth impaired driving investigation in the approximately 18 months he had been a member of the RCMP.

[70] Regardless of which is the explanation, the end result is that I do not believe that Constable Belak subjectively possessed the requisite reasonable and probable

grounds to believe that Mr. Bonilla had committed a s. 253 offence. He had a suspicion only.

[71] Further, when considering what was and was not observed by Constable Belak with respect to Mr. Bonilla's driving, indicia of alcohol consumption, and admission of drinking of alcohol, I am not satisfied on the application of an objective standard that Constable Belak had reasonable and probable grounds to make the s. 254(3) breath demand.

[72] Therefore, I cannot agree with the submission of Crown counsel. While the evidence undoubtedly allowed Constable Belak to form a suspicion that Mr. Bonilla had consumed alcohol, which is admitted by defence counsel to be the case, I find that it fell short of amounting to reasonable and probable grounds to believe that Mr. Bonilla had committed an impaired driving offence.

The Application of *Minielly*

[73] In ***Minielly***, a case I rendered judgment on only days before this trial, I held that once a police officer has reasonable and probable grounds to believe that a s. 253 offence has been committed, there is no longer any statutory authority to require a driver to provide a breath sample into an approved screening device pursuant to a s. 254(2) demand.

[74] ***Minielly*** was a case of refusal to provide a breath sample and therefore was not framed as a *Charter* application in which exclusion of the evidence was sought based upon a violation of Mr. Minielly's s. 8 or s. 10 *Charter* rights.

[75] As Constable Belak testified in cross-examination that he had formed his reasonable and probable grounds to believe that a s. 253 offence had been committed prior to making the s. 254(2) demand, the ***Minielly*** decision became potentially relevant. If ***Minielly*** applied without exception, then the s. 254(2) demand was unlawful and the fail result could not be considered as evidence for the purpose of providing Constable Belak the reasonable and probable grounds to make the s. 254(3) demand. As such, I pointed the decision out to counsel for consideration prior to submissions being concluded.

[76] In ***Minielly*** I referred to the ***R.*** v. ***Saxberg,*** [1998] O.J. No. 898 Ontario Court of Justice (General Division), decision in which the summary conviction appeal judge upheld the trial judge's finding that a s. 254(2) breath demand was lawful notwithstanding the police officer's testimony that he possessed the requisite reasonable and probable grounds for the s. 254(3) demand prior to administering the ASD demand. The trial judge in ***Saxberg*** found that the police officer was confused with respect to the distinction between the grounds required for the ASD and the grounds for the breathalyzer and found that the police officer had a suspicion only. Thus the police officer was allowed to make the s. 254(2) demand.

[77] The summary conviction appeal judge in ***Saxberg*** agreed that formation by a police officer of the requisite reasonable grounds to believe that a s. 253 offence has been committed precluded any subsequent use of the ASD pursuant to a s. 253(2) demand, but was not prepared to interfere with the trial judge's finding that the police officer had a suspicion only.

[78] I did not accede to Crown counsel's argument in ***Minielly*** that the police officer in that case did not, viewed objectively, have reasonable and probable grounds to make the s. 254(3) demand, thus making the s. 254(2) demand lawful. I found that there was a sufficient basis in what the police officer observed to have reasonably allowed him to have formed the subjective opinion that he possessed these grounds.

[79] This analysis, of course, presupposes that ***Minielly*** is good law. As it is currently under summary conviction appeal some clarification will likely be provided in the future.

Application of *Minielly* and *Saxberg* to the case at Bar

[80] I found that reasonable and probable grounds did not exist for the s. 254(3) demand without the fail result on the ASD. I have also found that without the ASD result Constable Belak did not have the subjective grounds to believe that a s. 253 offence had been committed. He either was confused or unclear about the distinction between suspicion and belief or was being less than truthful during cross-examination on this point. Either way, I find that the principle in ***Saxberg*** applies, and notwithstanding Constable Belak's testimony as to his possessing the reasonable and probable grounds to believe a s. 253 offence had been committed by Mr. Bonilla prior to making the s. 254(2) demand, I find that the s. 254(2) demand was lawful as it was made in circumstances where Constable Belak possessed only a suspicion.

[81] As to Mr. Bonilla having consumed alcohol, in ***Minielly*** I expressed some reservation about the application of ***Saxberg*** insofar as it could result in turning an unlawful demand into a lawful one by finding, from an objective analysis, that a police

officer did not have the reasonable and probable grounds to believe that a s. 253 offence had been committed that the officer subjectively thought he did have.

[82] When a police officer makes a s. 254(2) demand he is presumed to know the law and the statutory authority and limitations within which he or she must operate. If he or she subjectively believes that the reasonable and probable grounds to make the s. 254(3) demand exists, then how could it be said that the police officer could then think that the ASD could be utilized pursuant to a s. 254(2) demand? I draw a distinction, however, between a case where the police officer honestly possesses a subjective belief that he or she has reasonable and probable grounds to make a s. 254(3) demand and one in which a police officer does not have a subjective belief, regardless of his or her testimony otherwise. Where the subjective belief is found not to exist, the ASD demand is lawful.

Conclusion

[83] I find that Constable Belak had reasonable and probable grounds to make the s. 254(3) breath demand. In the event that I am found to have decided the s. 8 *Charter* issue incorrectly and Mr. Bonilla's *Charter* rights were infringed, I would have excluded the breathalyzer results from admission into trial for the reasons given in ***Hubbard*** in paragraph 36. These results are conscriptive evidence and the admission of this evidence would render the trial unfair and bring the administration of justice into disrepute. That is my decision on the *voir dire*.

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COZENS T.C.J.