Citation: *R.* v. *Bramadat-Willcock*, 2017 YKTC 25

Date: 20170605
Docket: 16-00503
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

MICHAEL JORDAN BRAMADAT-WILLCOCK

Appearances:
Leo Lane — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Mr. Bramadat-Willcock faces a charge that he drove his motor vehicle while his blood alcohol level exceeded the legal limit. This allegation arose on October 1, 2016 in Whitehorse.

[2] The question to be determined is whether the police took samples of Mr. Bramadat-Willcock's breath as soon as practicable. If not, is the Crown barred from relying on the presumption of identity in s. 258(1)(c) of the *Criminal Code*?

Relevant facts

[3] In the early morning hours of October 1, 2016, Cst. Clements pulled over a vehicle operated by Mr. Bramadat-Willcock due to her observation that the vehicle's headlights were not illuminated. This occurred in the downtown area of Whitehorse. Cst. Clements testified that she waited until she was in a safe area before pulling him over.

[4] According to the in-car video time stamp, she stopped Mr. Bramadat-Willcock's vehicle at just after 2:53 a.m. Based on a smell of alcohol on his breath and his admission to having consumed alcohol, the officer made an approved screening device demand. There was some delay in effecting this test due to a concern that Mr. Bramadat-Willcock had consumed alcohol in the prior 15 minutes.

[5] When Mr. Bramadat-Willcock ultimately provided a breath sample into the approved screening device, the result was a "fail". Cst Clements arrested him, provided him with his right to counsel and made a breathalyzer demand.

[6] Cst. Clements called for a tow truck at 3:16 a.m. Approximately 30 minutes later the tow truck had not arrived, at which time the officer left the scene in order to take Mr. Bramadat-Willcock to the police detachment, which was a very short distance away. After Mr. Bramadat-Willcock spoke to a lawyer, Cst. Clements commenced an observation period. Mr. Bramadat-Willcock subsequently provided his first breath sample at 4:28 a.m. and his second at 4:49 a.m.

Position of the parties

[7] The defence submits that the combined time of waiting for the tow truck and the observation periods prior to the respective samples bring this matter outside of the statutory language of taking breath samples “as soon as practicable”.

[8] The Crown submits that this argument should have been made pursuant to the *Charter*, in an earlier *voir dire* in this trial. Alternatively, the Crown argues that the breath tests were taken as soon as practicable.

Analysis

[9] The ultimate issue to be decided is whether the presumption or shortcut available to the Crown pursuant to s. 258(1)(c) is valid in the absence of a *Charter* application, even if all the prerequisites of that presumption have not been fulfilled.

[10] The prerequisite in question in this case is that each sample be taken “as soon as practicable” after the alleged offence.

[11] At the outset, it should be noted that both ss. 254(3) and 258(1)(c) employ the “as soon as practicable” language.

[12] Section 254(3) requires the provision of breath samples “as soon as practicable” in an investigation where a valid breath demand is made.

[13] Section 258(1)(c) stipulates, *inter alia*, that each breath sample is to be taken “as soon as practicable”.

[14] This phraseology has been held to mean that "the tests were taken within a reasonably prompt time under the circumstances" (*R. v. Vanderbruggen* (2006), 208 O.A.C. 379 at para. 12).

[15] There is no obligation that the Crown provide "an exact accounting of every moment in the chronology" (*Vanderbruggen* at para. 16). The inquiry should focus on whether, in all the circumstances, the police acted reasonably (*R. v. Seed* (1998), 114 O.A.C. 326 at para. 7).

[16] In the case before me, the traffic stop occurred in the downtown core of Whitehorse, very close to the police detachment. The investigating officer testified that she pulled over Mr. Bramadat-Willcock's vehicle in a safe area. Although she felt there was always a risk in leaving a vehicle unattended, there was nothing of concern that she specifically noted in the area where she stopped Mr. Bramadat-Willcock.

[17] Cst. Clements did not have an approved screening device with her at the time of the traffic stop. She requested that one be brought to her. Cst. Nixon arrived at the scene within three minutes of the request.

[18] Cst. Clements did not begin the testing process until approximately eight minutes after she had the machine, due to concerns of mouth alcohol. Cst. Nixon did not remain at the scene during this period of time.

[19] Once a tow truck was called, Cst. Clements waited for about 30 minutes for the tow truck to arrive. It never did. She decided to transport Mr. Bramadat-Willcock to the detachment and leave his locked vehicle on the side of the street.

[20] The officer testified that she recalled it being a busy night, but she could not remember whether she made any specific inquiries for someone to come to assist her, for the purpose of waiting for the tow truck while she went to the detachment with Mr. Bramadat-Willcock.

[21] It is true that the police have an obligation to safeguard a motor vehicle in their possession against loss or damage (*Wilkinson v. Watson Lake Motors Ltd.*, 2010 YKSC 48). However, in my view, the officer in this case has not provided a reasonable explanation as to why she stayed with the locked motor vehicle that was safely parked at the side of a street in the downtown area for a lengthy period of time, before ultimately determining to leave it unattended. There is no indication, for example, that it might have been a hazard to other motorists or that the vehicle or its contents were subject to a specific risk of theft or vandalism.

[22] I find that this 30 minute delay in bringing Mr. Bramadat-Willcock to the detachment resulted in the breath tests not being taken as soon as practicable.

[23] As it has been raised, I will also address the argument that the observation period conducted by Cst. Clements before each of the breath tests at the detachment was arbitrary and unreasonable. The defence has cited the decision in *R. v. Mudry*, 1979 ABCA 286 in support of the argument that there is no specific information regarding the duration or purpose of the observation period.

[24] The evidence is that the breath technician requested Cst. Clements to perform the two observation periods. The first observation period commenced at 4:05 a.m. and

the first sample was taken at 4:28 a.m. The second observation period started at 4:30 a.m. and a suitable sample was obtained at 4:49 a.m.

[25] Cst. Clements followed the instructions of the qualified technician in conducting the two observation periods. Although she, herself, is not a qualified technician, her evidence revealed that she was observing for signs of burping or regurgitation. She believed the observation period was usually 15 or 20 minutes. Her earlier evidence with respect to the roadside screening device clearly established that she understood the mischief that mouth alcohol may cause.

[26] In *Mudry*, it was observed:

> It appears that a practice of providing for a period of observation has grown up. Whether this is a necessary step to ensure protection for the accused, or to ensure that the machine has been properly warmed up, or to make the test fairer, has not been explained. This time is not required as a matter of law, and the evidence in future cases may not support its reasonableness…. para. 18

[27] Nonetheless, the Court found no infringement as the result of the 20 to 25 minute observation period.

[28] Although not dealing specifically with an observation period, a similar conclusion was reached in *R. v. Cambrin* (1982), 1 C.C.C. (3d) 59 (B.C.C.A.), where an unexplained gap of 21 minutes between the arrival at the police station and the samples being taken was not considered problematic (para. 16).

[29] In the present case, the officer had an understanding of the purpose of the observation period, as well as the normal range of time for this process.

[30] I do not find that the periods of observation led to the breath tests not being performed as soon as practicable.

Is the Crown barred from relying on the presumption of identity based on the tests not being taken as soon as practicable?

[31] Having found that the delay in bringing Mr. Bramadat-Willcock to the detachment resulted in the breath tests not being taken as soon as practicable, I now consider whether this affects the presumption of identity.

[32] As outlined above, the language of "as soon as practicable" is employed in two sections of the *Criminal Code* covering the offences of drinking and driving, namely ss. 258(1)(c) and 254(3).

"As soon as practicable" and its effect on the s. 258(1)(c) presumption

[33] Section 258(1)(c) reads:

> where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
>
> (i) [Repealed before coming into force, 2008, c. 20, s. 3]
>
> (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
>
> (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
>
> (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

> evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed; (emphasis added)

[34] In other words if certain prerequisites are met, the Crown is relieved of the burden of having to establish the exact blood alcohol level at the time of driving. Expert evidence is not required to be called to extrapolate the breath readings back to the time of driving. This is commonly referred to as the presumption of identity (*R. v. St. Pierre*, [1995] 1 S.C.R. 791). As stated in *R. v. St. Pierre*, presumptions are 'merely legal or evidentiary shortcuts designed to bridge difficult evidentiary gaps'. para. 23

[35] One of the preconditions to the s. 258(1)(c) presumption is clearly that the tests be taken 'as soon as practicable'.

[36] The decision in *R. v. Willette*, 2011 ONSC 1055 considers the rationale for such a requirement:

> 46 The "as soon as practicable" requirement was enacted as a protection for the accused, since the presumption operates to fix the accused with a blood alcohol content that existed sometime after the time of driving. This requirement mandates that the breath test be conducted as soon after the time of driving as reasonably possible in order to ensure that the presumption operates fairly and that the breath testing leads to accurate results: R. v. Davidson, [2005] O.J. No. 3474 at para. 12 (S.C.J.); R. v. Phillips, [1988] O.J. No. 415 (C.A.).

> 47 In enacting the "as soon as practicable" requirement, Parliament was concerned that it protect against the manipulation of the results by delaying testing to allow for increased absorption of alcohol into the accused's blood: R. v. MacMillan, [2004] O.J. No. 4523 at para. 37 (O.C.J.)
>
> 48 Accordingly, any delay encroaches on a protection that Parliament has enacted for the benefit of the accused: Davidson, supra, at para. 19.
>
> 49 It is also necessary that compliance with this statutory scheme be strictly construed, since it relieves the Crown of the obligation to adduce additional extrapolation evidence and the necessity of calling an expert: R. v. Noble, [1977] S.C.J. No. 68 at pages 7 and 8 (S.C.C.); R. v. Walker, [2006] O.J. No. 2679 at para. 2 (S.C.J.); R. v. Wolff, [1976] O.J. No. 694 (H.C.J).

"As soon as practicable" and its effect on admissibility

[37] Section 254(3) states:

> If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person
>
> (a) to provide, as soon as practicable,
>
> (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or … (emphasis added)

[38] The Crown argues that since a *Charter* application is required to challenge the issue of an officer's reasonable grounds (as will be discussed below), and as s. 254(3) relies on the language of "as soon as practicable", a *Charter* application should be required whether in the context of s. 258(1)(c) or s. 254(3). The Crown says that the fact that the "as soon as practicable" language is found in both ss. 254(3) and 258(1)(c)

is of significance and a consistent interpretation of that phrase is necessary. The Crown submits that the "as soon as practicable" language in both sections concerns the liberty interests of the accused, and that since s. 254(3) litigation is conducted within the *Charter* framework, so should a challenge of the same language in s. 258(1)(c).

[39] To better comprehend this issue, it is useful to first consider the evolution of case law flowing from s. 254(3). In *R. v. Rilling*, [1976] 2 S.C.R. 183, the majority held that, despite the language in what is now s. 254(3) – namely, that an officer must have reasonable grounds to believe a person is committing a drinking and driving offence – if the driver nonetheless submits to breath tests in a situation where the officer did not have reasonable grounds, it does not render the certificate evidence inadmissible.

[40] If the driver refuses, however, to provide breath samples, the lack of reasonable grounds may afford a defence.

[41] In *R. v. Bernshaw*, [1995] 1 S.C.R. 254, Cory, J. speaking for the minority opined that *Rilling* is still good law. He stated,

> …Yet, where an accused complies with the breathalyzer demand, the Crown need not prove as part of its case that it had reasonable and probable grounds to make the demand. Rather, I think, the onus rests upon the accused to establish on the balance of probabilities that there has been a *Charter* breach and that, under s. 24(2), the evidence should be excluded. There should not be an automatic exclusion of the breathalyzer test results. para. 41

[42] Contradictory appellate decisions ensued. The decision in *R. v. Searle*, 2006 NBCA 118, found that if the police make an unlawful demand as a result of the police

lacking reasonable grounds, the Crown cannot rely on the s. 258(1)(c) presumption, even where a *Charter* violation is not alleged.

[43] In *R. v. Charette*, 2009 ONCA 310, the opposite conclusion was reached. Instead of forcing the Crown to call all of its evidence in anticipation of an argument that no reasonable grounds for the demand existed, Moldaver J.A. (as he then was) found that it was more practical for the defendant to "challenge the admissibility of the test results under s. 8 and seek to exclude those results under s. 24(2)" (para. 50).

[44] It should be noted that Mr. Charette argued that, despite *Rilling*, a valid demand (based on reasonable grounds) was a condition precedent to the Crown moving on and relying on the presumption in s. 258(1)(c). The argument was based on the introductory words to this presumption section, which read "where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3)…".

[45] Since s. 254(3) makes reference to an officer having reasonable grounds for the demand, it was argued that the "demand" must mean a valid demand, that is to say, based on reasonable grounds.

[46] The *Charette* decision rejected this argument, relying on the finding in *Rilling* that an absence of reasonable grounds does not affect the admissibility of the certificate (paras. 41-44).

[47] The decision in *R. v. Forsythe*, 2009 MBCA 123 (leave to appeal refused, [2010] S.C.C.A. No. 60), involved a fact situation that resembles the matter before me. The

defence challenged the admissibility of the breath test results on the basis that the breath samples were not taken "as soon as practicable".

[48] *Forsythe* considered this argument pursuant to the language in s. 254(3), followed the rationale in *Rilling*, and further held, as the Court had in *Charette*, that it was appropriate to challenge admissibility under the *Charter*[1].

Admissibility under s. 254(3) as opposed to the s. 258(1)(c) presumption

[49] *Forsythe* does not specifically tackle the issue of the applicability of the s. 258(1)(c) presumption if the samples are not taken as soon as practicable.

[50] I note too that Beard J.A. sitting as a Chambers judge in the Manitoba Court of Appeal in *R. v. Fenske*, 2015 MCA 113, found that the issue of the application of the presumption is sufficiently different from the issue of admissibility of the certificate that an appeal was allowed on this very question over the Crown's objection that it had been resolved by *Forsythe*.

[51] Therefore, the difference between *Forsythe* and the matter before me is that the argument before me is based, not on the wording of s. 254(3) (dealing with admissibility), but on the wording of s. 258(1)(c) (dealing with that presumption). Although the "as soon as practicable" language is found in both, in s. 258(1)(c), the language is one of the prerequisites to be met before the presumption applies.

[1] The *Forsythe* decision has been considered by various courts, leading to different results (see, for example, *R. v. Browning*, 2015 ABPC 3 and *R. v. Mizera*, 2015 ABPC 49)

[52] Not only must the breath tests be taken “as soon as practicable” after the time of the alleged offence, the first sample must be taken “not later than two hours after that time”, with at least a fifteen minute interval between samples.

[53] The other preconditions include the accused providing each sample into an improved instrument, operated by a qualified technician who also must perform an analysis of each sample.

[54] If all these prerequisites must be met in order for the Crown to rely on the presumption, it seems illogical that the “as soon as practicable” language can be hived off. It is either a prerequisite or it is not. It is necessary to consider the statutory language in the 258(1)(c)(ii) which I again set out:

> (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken, (emphasis added)

[55] Due to the conjunctive construction of this phrase, I do not see how the “as soon as practicable” language can be divorced from the “not later than two hours” and “fifteen minutes” language.

[56] It is important to remember that case law holds that the Crown may not rely on the presumption in s. 258(1)(c) if the first sample was taken outside of the two hour limit outlined in subsection (ii) (see, for example, *R. v. Blanchard* 2005 YKSC 10 at para. 63).

[57] Similarly, if the two samples are taken less than fifteen minutes apart, the Crown is not entitled to rely on the presumption (*R. v. Andrushko* (1997), 34 C.C.C. (2d) 273 (Man. C.A.)).

[58] Due to the requirement for two samples, where only one is obtained, the Crown may not rely on the presumption (*R. v. Noble,* [1978] 1 S.C.R. 632).

[59] A similar situation results if the sample is not received into an approved instrument (*R. v. Alatyppo* (1983)*,* 4 C.C.C. (3d) 514 (Ont. C.A.); *R. v. Mulroney*, 2009 ONCA 766), another of the preconditions.

[60] In all of these situations, where one of the s. 258(1)(c) prerequisites is not met and the Crown is unable to rely on the presumption of identity, the evidence of the breath test results may still be admissible (*R. v. Deruelle*, [1992] 2 S.C.R. 663 at para. 17). The Crown may still call expert evidence extrapolating the breath test readings results in order to prove the accused's blood alcohol level at the time of driving (see *R. v. Burnison* (1979), 70 C.C.C. (2d) 38 (Ont. C.A.); *R. v. Grosse* (1996), 91 O.A.C. 40).

[61] In my view, considering the rules of statutory interpretation, I am bound to find that the language of taking the samples "as soon as practicable" is one of the preconditions to be met before the Crown is entitled to rely on this evidentiary shortcut.

[62] The Crown has not satisfied me that this precondition has been met in the circumstances of this case, and as such the Crown cannot rely on the presumption of identity. As there is no evidence before me that relates the readings in the Certificate of

Qualified Technician to the time police stopped Mr. Bramadat-Willcock, there is no evidence of his blood alcohol level at the time of driving.

[63] I find him not guilty of operating his motor vehicle with a blood alcohol level exceeding the legal limit.

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CHISHOLM T.C.J.