Citation: *R.* v. *Smarch*, 2013 YKTC 76

Date: 20130617
Docket: 12-00950
Registry: Whitehorse

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

REGINA

v.

KRISTINE SMARCH

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Kim Hawkins — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] LUTHER T.C.J. (Oral): Kristine Smarch is charged:

Count 1: On or about the 1st day of December in the year 2012 at the City of WHITEHORSE in the Yukon Territory, while her ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle, contrary to Section 253(1)(a) of the Criminal Code.

Count 2: On or about the 1st day of December in the year 2012 at the City of WHITEHORSE in the Yukon Territory, having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, did operate a motor vehicle, contrary to Section 253(1)(b) of the Criminal Code.

[2] The evidence was heard of June 4, 2013, and the only witness we heard was Constable Baceda. The main issue: Did the Constable have reasonable grounds to suspect that the defendant had alcohol in her body? If not, were her ss. 8 and 10(b)

Charter rights violated?

[3] I agree with the state of the law as set out by Mr. Justice Hill in *R.* v. *Williams*, 2010 ONSC 1698. In *R.* v. *Otchere*, 2013 ONCJ 14, Judge Kastner posed a key question at para. 54.

> … Does the absence of odour of alcohol prevent the officer from having a reasonable suspicion that the driver has alcohol in his body?

Then at para. 55:

> The simple answer is that it does not necessarily negate reasonable suspicion. The odour of alcohol is not a necessary precondition to the making of the screening demand. …

Further on in that decision, at paras. 57 and 58:

> Similarly, the denial of consuming of alcohol, or the driver's assertion of the amount and time of consumption, will be considered by the officer in assessing either reasonable suspicion, or even reasonable and probable grounds in other scenarios, and an officer may be "naturally skeptical" as to the reliability of the driver's account "given any experienced officer's enforcement experience with drinking/driving scenarios."
>
> A police officer is not obliged to accept every explanation of statement provided by an investigatively detained suspect. As was stated in the *Mutisi* decision, "if a driver claims to have 'had one beer or nothing to drink, the officer was not required to accept what he was told': ….

[4] Typically, in these cases, there are certain explanations which, after the fact, may be plausible, but it is important to ascertain what the peace officer's actual observations were at the time, and also that they were accurate and that the peace officer has a duty to enforce the law.

[5] Let us take a look at the facts of this case. We know that on December 1, 2012,

it was very cold. The truck was going up Two Mile Hill and there were no rear lights. The police officer pulled the truck over. The defendant had difficulty opening the door. The police officer noted that there were two cans of Budweiser beer on the dash. The defendant did not have a licence with her. She claimed to have left it at the beer store. Her speech was slow and deliberate. Her motor skills were slow and deliberate. Her driving was fine. She offered a statement to the police officer that she had had one beer at lunch. Her walk back to the patrol car was uneventful. There was a passenger in her vehicle who was passed out.

[6] As we go through these various steps, it is important to realize that some of them, even with the officer's observations at the time, would not be an indicator to give him a reasonable suspicion that there was alcohol in her body; for example, the difficulty opening the door. She and the officer knew that it was a very cold evening in Whitehorse. Her driving was okay. Naturally, that is not an indicator. The two cans of Budweiser beer on the dash in themselves would not be an indicator, but coupled with other facts, would definitely cause the police officer to reflect on what was going on. The explanation given by the defendant that she did not have her licence, having left it at the beer store, would be a potential indicator. She was coming from a beer store, there was beer in her vehicle, and coupled with her explanation, which the officer was free to accept or reject, having one beer at lunch, would add to the grounds as he was building his suspicions.

[7] Her speech was slow and deliberate. Now, it may well be that this could be explained away by the cold; maybe she was tired; maybe she always spoke like that, but the officer did point out that this was not normal. Now, of course, he did not know

what was normal for her, but he would be able to know what was normal for most people. He did specifically note that her motor skills were slow and deliberate. Again, was that normal for her? Is it normal for most? He indicated to us that he felt that that helped add to his suspicion. The fact that there was a passenger passed out in the vehicle is not an indication in itself because society these days does encourage designated drivers.

[8] Interestingly enough, the officer proceeded to go back to his patrol vehicle and there was a five-minute delay from initially speaking to her and when he gave her the demand. He claims that he was reflecting on whether or not he had the requisite grounds for this reasonable suspicion, as opposed to just having a hunch. The five-minute delay from initially speaking to her I believe does fall within the forthwith because the police officer did have the instrument available and he was not unduly delaying the process. It was reasonable for him to go back to the patrol car and check out her licence status and, indeed, her identity when she was unable to produce the licence. In the process of doing so, the officer was also looking for priors and a history while in the patrol car, but, again, according to his evidence, he was continuing to weigh his suspicions but admitted that he could have given the ASD demand at an earlier point.

[9] It seems to me that the Constable should have been more observant as to the beer cans and whether they were sealed or open. Very clearly, he should have known about the difference between reasonable and probable grounds for a breathalyzer demand and a reasonable suspicion for a roadside screening demand, but overall, it is my view that, based on the fact that her speech was slow and deliberate, which he described as not normal, the fact that there was some beer present in the vehicle, the

fact that the defendant did not have her licence, having claimed to have left it at the beer store, and her claim that she did have alcohol in her body earlier in the day, raised this significantly beyond a hunch. We must remember that the officer was not obliged to believe the defendant as to the quantity of alcohol consumed and the time of consumption.

[10] So what were the officer's options at the time? Was he to let a potential impaired driver go and possibly be in neglect of his duty and endanger the public? Or was he to conduct a brief investigation of 10 to 20 minutes into the state of her potential impairment? Or was he to give her the quick screening demand, and if she passes she is on her way very quickly?

[11] The officer knew for sure that she was driving. That point is not in dispute. As I indicated, I believe that he did have a reasonable suspicion that there was alcohol in her body.

[12] As to the breath samples at the detachment not being taken as quickly as they might have been, there was an explanation that there was one technician, one machine, and one other person blowing into it. That explanation I believe is reasonable. If there was evidence on this occasion that there were two or more others about to blow into a breathalyzer machine, that there was a longer delay, it would be incumbent on the police to have available another machine and another technician to avoid an unacceptable delay, similarly if there is some evidence that this was a constant problem of people having to wait. However, I believe the explanation of one technician, one machine, and one other person is acceptable, and certainly the breathalyzer samples

were taken with time to spare.

[13] In conclusion, it is my view that the officer did have a reasonable suspicion that there was alcohol in her body, and he gave her the roadside screening demand. If I am wrong in this determination that he did have this reasonable suspicion of alcohol in her body, any s. 8 breach was extremely minimal. The constable was polite, reasonably diligent and professional, and he acted in good faith. He knew he needed a reasonable suspicion, and he was mulling that around in his mind for a brief period of time. He was not wilfully blind. He was not acting in any disdainful way towards the defendant, although, as I said earlier, it troubles me that he was not aware of the difference between reasonable and probable grounds and reasonable suspicion.

[14] If we take a look at *R.* v. *Grant,* 2009 SCC 32, paras. 108, 109 and 110, the Supreme Court of Canada, in July of 2009, talked about the importance of the s. 24(2) analysis, and quite clearly, the first inquiry, there was not deliberate and egregious police conduct. The admission of the evidence would have little adverse effect on the repute of the court process.

[15] The second inquiry, as to the examination of the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused, I would have to conclude the intrusion here was minimal. We are talking about a brief period of time. We are talking about a sample of breath to be taken into a roadside screening device.

[16] At para. 110 of *Grant, supra*:

> The third line of inquiry … will usually favour admission in cases involving bodily samples. Unlike compelled statements, evidence obtained from the accused's body is generally reliable and the risk of error inherent in depriving the trier of fact of the evidence may well tip the balance in favour of admission.

[17] This is a watershed case, because previous to that, courts were essentially very consistently ruling that there breaches of the *Charter* and not letting it in. This type of evidence was conscriptive and the courts would not admit it.

[18] In conclusion, at para. 111:

> … On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.

[19] Of course, the time taken to give a roadside screening sample on the road is a lot less, both in terms of time and effort, because you are essentially only providing one good sample on the road, as opposed to at least two at the detachment for the breathalyzer machine.

[20] The *Grant* case, *supra,* from the summer of 2009, effectively changed the law in a major way. Likely, the cases of *R.* v. *Rasheed*, 2009 ONCJ 41, *R.* v. *Hemery*, 2008 ABPC 209, and *R.* v. *McCullough*, 2007 ABQB 423, would have been decided differently. As to *R.* v. *Davis*, [2001] O.J. No. 2984, it is hard to say. Quite clearly, the officer, in my view, was neglectful in that case for not having inquired whether the defendant had been drinking. Constable Baceda, in this case, of course did.

[21] As to s. 10(b), there is no magic in the exact amount of time. In *R.* v. *Quansah,*

2012 ONCA 123, 17 minutes was justified. The five minutes in this case was justified, as I have already determined. The officer here was not wasting time and the instrument was present. There may be instances where five, ten or 17 minutes would not meet the criteria of forthwith.

[22] I agree substantially with the five-part test set out by the Ontario Court of Appeal in *Quansah, supra*. As to requirement two, the constable here was reflecting on suspicions as he was in the patrol car, although on reflection he admitted he could have made the demand earlier. As to requirement four, the constable was on the radio to check out her licence status and her identity as she did not have her licence with her.

[23] So while this is a close case, I do feel that the officer did have the grounds set out in s. 254(2), and the Court is satisfied that the Crown's case has been met.

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LUTHER T.C.J.