Citation: *R. v. Scarizzi*, 2021 YKTC 33

Date: 20210827
Docket: 20-00017
Registry: Whitehorse

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

REGINA

v.

MICHAEL ROBERT SCARIZZI

Appearances:
Kevin Gillespie — Counsel for the Crown
David C. Tarnow — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Michael Scarizzi has been charged with having committed offences contrary to ss. 320.14(a) and (b) of the *Criminal Code*. Counsel for Mr. Scarizzi has filed a Notice of *Charter* Application alleging breaches of Mr. Scarizzi's ss. 8 and 9 *Charter* rights. He seeks exclusion of the breath samples pursuant to s. 24(2) of the *Charter*.

[2] The trial took place in a *voir dire* on January 18, April 19, and June 28, 2021. Judgment was reserved. This is my judgment on the *Charter* application.

Cst. Marc-Antoine Breton

[3] At the time of the offence, Cst. Breton had approximately 12 years experience as an RCMP officer. He testified that on March 14, 2020, he observed a vehicle being

driven by Mr. Scarizzi travelling 92 km/h in a 70 km/h zone heading northbound on Mountainview Dr. in Whitehorse. Cst. Breton activated his emergency lights, and Mr. Scarizzi pulled the vehicle over at approximately 1:33 a.m.

[4] Cst. Breton detected an odour of liquor coming from inside the vehicle while Mr. Scarizzi was sitting in the vehicle. Cst. Breton noted Mr. Scarizzi's eyes to be bloodshot.

[5] Mr. Scarizzi stated that he had consumed one drink of alcohol. Cst. Breton did not ask what that drink was, or when Mr. Scarizzi had last consumed any alcohol. He stated that Mr. Scarizzi did not tell him when he had consumed his last drink. Mr. Scarizzi also did not tell Cst. Breton where he was coming from, nor was he asked.

[6] Cst. Breton stated that he did not observe any open liquor in the vehicle, and that he had no reason to believe that Mr. Scarizzi had consumed any alcohol in the last 15 minutes.

[7] He testified that he had been trained in the use of the Approved Screening Device ("ASD") through a course offered in Whitehorse. He said that he had reviewed the ASD Training Manual on slides, but was unsure whether he had kept a copy of a printout of the Manual.

[8] Cst. Breton stated that he was aware that the consumption of alcohol within a 15-minute period prior to providing a breath sample into the ASD could result in an inaccurate reading due to the presence of residual mouth alcohol. He admitted in

cross-examination that he should have asked Mr. Scarizzi when his last drink was, but that he made a mistake in not asking him.

[9] Cst. Breton stated that he did not check to see if Mr. Scarizzi had any objects in his mouth, and that he did not ask Mr. Scarizzi if he had been smoking. He stated that he never saw any smoke and did not see Mr. Scarizzi smoking.

[10] Cst. Breton acknowledged that despite being trained to check for recent consumption of alcohol, for objects in the mouth and for recent smoking, which was known as "confirming subject suitability", he did not do so in this case. He further acknowledged that he had been trained to watch out for these three things. He acknowledged that the ASD Training Manual required that he confirm subject suitability, that he had not taken steps to do so, and that his failure to do so could potentially have produced a false reading on the ASD.

[11] Cst. Breton testified that he may have made this mistake in part because his adrenalin was going when he activated his police cruiser's emergency lights, and that he was worried about his safety. He stated that he was aware, coming into the trial, that he had missed doing a few things, and that, looking back, it may have been wrong for him to rely on the "Fail" reading. He agreed that without the "Fail" reading, he did not have grounds to make a breath demand for the approved instrument. This said, in re-direct, he agreed that at the time that he received the "Fail" reading, he had grounds to believe Mr. Scarizzi had alcohol in his system.

[12] Cst. Breton testified that he formed the grounds to make the ASD demand at 1:35 a.m. and immediately read Mr. Scarizzi the ASD demand. Mr. Scarizzi then

provided a sample of his breath, and at 1:38 a.m. a “Fail” reading resulted. Mr. Scarizzi was arrested at 1:39 a.m., and then transported to the RCMP Detachment where he provided breath samples into an approved instrument. Readings of 100 mg% and 90 mg% blood alcohol were recorded.

[13] Cst. Breton testified that he did not have a recording of his interactions with Mr. Scarizzi because, due to an oversight on his part, his microphone was turned off. In cross-examination he agreed with the question put to him that he had smelled alcohol on Mr. Scarizzi’s breath.

Cst. Louis Allain

[14] Cst. Allain has approximately 13.5 years experience as a police officer. He was trained to use, calibrate, and train others in the operation and use of the ASD. In November 2018, he trained Cst. Breton.

[15] He admitted to having utilized the 2014 Alco-Sensor FST Operator’s Manual (“2014 Manual”) in his training, not being aware until February 2021, that a 2018 Alco-Sensor FST Operator’s Manual (“2018 Manual”) had been released in December 2018. He is aware that there is now a 2020 Alco-Sensor FST Operator’s Manual (“2020 Manual”), however, the 2020 Manual is only utilized in British Columbia. The 2018 Manual is used Canada-wide except for in British Columbia.

[16] Cst. Allain stated, however, that there was nothing different in the 2018 Manual that would have impacted Cst. Breton’s use of the ASD on March 14, 2020.

[17] Cst. Allain testified that, in order to ensure the accuracy of the ASD result, a police officer can delay the taking of the breath sample if the officer has a reason to believe that the driver has consumed alcohol within the immediately preceding 15 minutes.

[18] He testified that it is his practice to ask every driver that he suspects of impaired operation of a motor vehicle when the driver's last drink was. However, he testified that he does not tell trainees that it is an error not to ask when a driver has last consumed alcohol.

[19] He testified that he provides trainees examples of when they should ask, such as when alcohol is in easy reach of the driver, or if they observe vomiting, burping or belching. He stated that it was only when an officer had reason to believe there had been recent consumption of alcohol, or an object in the mouth, or recent smoking, that the officer should delay in administering the ASD.

Cpl. Grant Gottgetreu

[20] Cpl. Gottgetreu testified for the defence. He was qualified as an expert with special skill and knowledge in impaired driving investigations and in the use and operation of the Alco-Sensor FST. He performed a supervisory role over impaired driving investigations prior to his retirement from the RCMP in 2017. He had 28 years of policing experience prior to his retirement.

[21] A copy of Cpl. Gottgetreu's *curriculum vitae* was filed that set out his considerable experience in impaired driving policing, as well as in traffic related police courses and training. He also prepared an Expert Report (the "Report") that was filed.

[22] Cpl. Gottgetreu stated that he had incorrectly assumed that the 2020 Manual was in use in the Yukon, and was not aware when he prepared the Report that the 2018 Manual was the one in use in the Yukon. However, he testified that the criteria for confirming subject suitability was the same in the 2014, 2018, and 2020 Manuals. (I note that, for ease of reference in this decision, I will refer to these collectively as the Manual, given the confusion in the use of any particular one of these by Cst. Allain and Cpl. Gottgetreu, as the relevant portions of these have not changed).

[23] He testified that it was important to confirm subject suitability prior to administering the ASD. In his opinion, in order to comply with the instructions in the Manual, a police officer was required to ask a driver when they had consumed their last drink, whether they had any objects in their mouth (including asking the driver to open his or her mouth), and whether they had been smoking. He stated that a failure to do any of these meant that the result of the ASD breath sampling procedure was not reliable. He said that the requirement in the Manual to "ensure" that all of these subject suitability criteria were met before requiring a breath sample, meant that there was a positive obligation on a police officer to eliminate the possibility that a failure to establish one of these three criteria could compromise the accuracy of the result from the administering of the ASD.

[24] Cpl. Gottgetreu concluded in the Report that: “It is my opinion that the ASD test result was unreliable because Cst BRETON failed to *Confirm Subject Suitability* prior to administering the ASD test.”

[25] It was Cpl. Gottgetreu’s position that his conclusion was justified due to Cst. Breton’s failure to ask questions about: when Mr. Scarizzi had consumed his last drink; to check whether Mr. Scarizzi presently, or had recently had, any objects in his mouth; and the lack of any evidence that Cst. Breton had ensured Mr. Scarizzi had not smoked anything in the five minutes prior to providing the breath sample into the ASD.

[26] Cpl. Gottgetreu stated, however, that there is nothing in any of the Manuals that speaks to the issue of the presence of tobacco smoke potentially providing a false high reading, such as is stated with respect to the presence of mouth alcohol or objects in the mouth.

Analysis

[27] There was considerable testimony from Cst. Breton and Cst. Allain, as well as from Cpl. Gottgetreu, about other aspects of the training in and operation of the ASD, beyond confirming subject suitability. These other areas related to temperature, notetaking, and other features of the ASD. While I appreciate and understand the rationale for why certain questions were asked, and the context that the responses provided, for the purposes of this decision, I do not consider it necessary to review and comment on most of these areas.

[28] Rather, I will confine my reasoning to the area of confirming subject suitability.

[29] The 2014 Manual reads:

> **4.4 Confirming subject suitability**
>
> A test on a subject shall not be conducted until:
>
> 1. **15 minutes** after the time the officer believes alcohol has last been consumed
> 2. **5 minutes** after the time the officer believes anything has been taken by mouth
> 3. **5 minutes** after the time the officer believes anything has been smoked.
>
> **Mouth alcohol**
>
> …Prior to administering the breath test, ensure 15 minutes has passed from the time of the last drink. This will minimize the possibility of a falsely high Alco-Sensor FST result.
>
> **Objects in mouth**
>
> …If the subject has placed anything in their mouth have the subject remove the object from their mouth and/or stop drinking. Wait at least five (5) minutes for the mouth temperature to stabilize before taking a breath sample. …
>
> **Tobacco**
>
> Under no circumstances should raw cigarette smoke be blown directly into the Alco-Sensor FST, as it may shorten the life of the fuel cell sensor. …
>
> …
>
> **7.2 Articulation**
>
> 2. Presence of mouth alcohol
>
> If mouth alcohol is present, and a 15 minute time period is not implemented prior to testing on the ASD, a false high result may be obtained on the ASD, followed by a lower result on the approved instrument. This can be avoided by ensuring that a 15 minute wait period occurs when recent consumption of alcohol is suspected.

[30] This wording remains the same in the 2018 and 2020 Manuals.

[31] The issue here is what was the obligation on Cst. Breton, if any, to ask Mr. Scarizzi when he had consumed his last drink, whether he had, or had recently had, any objects in his mouth, and whether he had recently been smoking.

[32] Crown counsel asserts that there was no such obligation, and that Cst. Breton was able to rely on the "Fail" result in forming his grounds to make the breath demand for the approved instrument. Counsel for Mr. Scarizzi asserts that there was such an obligation, and that Cst. Breton's failure to do so renders his reliance on the ASD "Fail" result in forming his grounds to make the demand for the approved instrument, a breach of Mr. Scarizzi's ss. 8 and 9 *Charter* rights.

[33] In my opinion, the distinction between the two positions is premised on the significance of the difference between what Cst. Breton "believed" in regard to confirming subject suitability, and what he was required to ensure in order to come to his belief.

[34] In ***R.*** v. ***Bonilla***, 2009 YKTC 40, I found that the RCMP officer was able to rely on the "Fail" result from the ASD, notwithstanding that the officer " ...had no more than a cursory knowledge of the parameters within which it could be reliably operated."… (para. 58).

[35] In ***Bonilla***, Cst. Belak had testified that, while he was aware that residual mouth alcohol could cause a problem, he thought that it was only a recommendation that he wait 12-15 minutes before administering the ASD, not that it was a requirement that he do so. He believed that it was only if he saw the subject drinking that he was required to wait (para. 51).

[36] I stated at para. 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 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…

[37] I found that Cst. Belak's subjective belief in the reliability of the ASD was sufficient in that case.

[38] In ***R.*** v. ***Schlechter***, 2018 SKCA 45, the Court specifically rejected the argument that a smell of alcohol and admission of drinking by the driver, in conjunction with the police officer's knowledge that residual mouth alcohol could affect the reliability of the ASD result, therefore meant that the officer was wrong in relying on the "Fail" result without having asked the driver when his last drink was.

[39] The Court stated at para. 41:

> In *R v Bernshaw*, the Supreme Court clarified that even in circumstances where the suspect tells the officer he or she has recently consumed alcohol, the officer is under no obligation to delay the ASD unless the officer believes the statement and is concerned the presence of mouth alcohol will impact the validity of the ASD test: *R v Bernshaw* [[1995] 1 S.C.R. 254] at para 82.

[40] The Court further stated at para. 43, referring to the decisions in ***Bernshaw***, ***R.*** v. ***Smith***, 2009 SKCA 139 at para. 7, and ***R.*** v. ***Einarson***, [2004] 70 O.R. (3d) 286 (C.A.) that:

> I take these decisions to stand for the proposition that there is no police duty to obtain information from a subject as to the timing of his or her last drink, and furthermore, that a failure to delay the ASD test does not negate the officer's reliance on the result when the officer is found to be acting bona fide in administering the test.

[41] At paras. 48 to 51, the Court states:

> 48 I agree with Ontario Court of Appeal that information related to the presence of mouth alcohol may become relevant to the court's assessment of the subjective and objective existence of reasonable and probable grounds. The jurisprudence is clear that when an officer has *actual knowledge* of residual mouth alcohol at the time the ASD is administered, either due to the officer having witnessed recent consumption or if the suspect tells the officer he has recently consumed alcohol *and* the officer believes the statement, then the officer cannot honestly believe there are reasonable and probable grounds: *R v Bernshaw* at paras 50, 60 and 82; *R v Notaro* at para 38. This makes sense as it would be dishonest for an officer who is aware that an ASD result will be inaccurate due to the presence of residual mouth alcohol to rely on the fail reading to support a belief that the suspect has committed an offence.
>
> 49 Absent evidence of the officer having *actual knowledge* of residual mouth alcohol, the officer's honestly held belief that the ASD fail was accurate or reliable will satisfy the subjective component of the test *even when* the officer did not consider or inquire as to the presence of mouth alcohol or ascertain the timing of the suspect's last drink: *R v Notaro* at para 37. In these circumstances, once the subjective component is met, the analysis turns to the objective reasonableness of the officer's belief on the basis of the information known to the officer.
>
> 50 In *R v Bernshaw*, the Supreme Court explained that in most cases, a "fail" result from a properly conducted roadside screening test will furnish the officer with the requisite reasonable and probable grounds and that, in such circumstances, the officer's reliance on the fail result is objectively reasonable, *unless* there is objective "credible evidence" to indicate the results should not be relied upon: *R v Bernshaw* at paras 49 and 80.
>
> 51 It is well established that the possibility that a driver has consumed alcohol within 15 minutes is not enough to negate the objective reasonableness of the officer's reliance on an ASD fail to form her belief: *R v Smith* at para 7; *R v Einarson* at para 35; *R v Notaro* at para 54; *R v Mastromartino* at para 23(4). Furthermore, an officer observing a suspect driving away from a drinking establishment does not negate the

> objective reasonableness of the officer's reliance on an ASD: *R v Mastromartino* at para 23(6); *R v Einarson* at paras 33-35. Even if the officer could have made inquiries, it is not necessary for her to have done so prior to administering the ASD: *R v Mastromartino* at para 59; *R v Notaro* at para 39.

[42] At para. 59, the Court states:

> …It is well-settled law that a possibility of recent alcohol consumption is not enough to require a delay and does not undermine the reasonableness of relying on an ASD fail result: *R v Notaro* at para 61: *R v Einarson* at para 33; *R v Mastromartino* at para 23.

[43] Counsel for Mr. Scarizzi has not provided me any cases that would differ from those cases cited above with respect to the extent of any obligation on a police officer to make inquiries into the possibility of subject suitability being compromised.

[44] Defence counsel provided the case of ***R.*** v. ***McGuire***, 2020 YKTC 32. At paras. 106-108 I stated:

> 106 As per ***Bernshaw***, in paras. 48 to 60, the Court states that in order for a police officer to rely on an ASD result, the police officer must have a reasonable basis to believe that the test was done properly. As stated in para. 54:
>
> > In *R. v. Richardson*, Ont. Prov. Div., October 31, 1990, unreported, Sharpe Prov. Div. J. held that an officer who was trained in the use of screening devices and who failed to wait 15 minutes prior to administering the test did not have reasonable and probable grounds to demand a breathalyzer. The reasoning of Sharpe Prov. Div. J. emphasizes that an unreliable test cannot form the necessary legal foundation for a subsequent breathalyzer demand:
> >
> > > ...An improper taking of the test with a resulting variable reading cannot in the opinion of the court, form either reasonable or probable grounds for the making of a Demand under Section 254(3) of the Criminal Code of Canada. (Emphasis added]

> 107 As stated in ***R***. v. ***Biccum***, 2012 ABCA 80, in para. 20:
>
> > The law requires that the constable have an honest subjective belief that he has grounds to make the demand for a breath sample. Further, that honest subjective belief must be objectively reasonable...
>
> 108 In my opinion, ignorance of the fundamental operational aspects of the ASD, i.e. the displays generated, the temperature of the ASD, and the beeping sounds emitted, which are intended to alert the operator as to where the ASD is in the sampling process, does not serve to enhance the ability of the operator to, in a somewhat wilfully blind manner, accept the results at face value. There is an obligation on a police officer to have this fundamental knowledge and to monitor the operation of the ASD accordingly when seeking to obtain a breath sample from a detainee.

[45] In the case of ***R.*** v. ***Burdek***, (an unreported decision of Page J., dated April 26, 2001), the RCMP officer made a breath demand for the approved instrument on the basis of the reasonable and probable grounds he formed following Mr. Burdek's participation in a roadside sobriety test. In finding that the officer did not have the requisite reasonable and probable grounds, Page J. stated at paras. 11 and 12:

> 11 In cross-examination, the constable was asked many, many questions as to how he had conducted this test. Without going through the questions in detail, it is apparent that the constable did not follow his training when conducting this test. Many things that should have been done were not done.
>
> 12 If the constable is going to be relying on a test, then he certainly must comply with his training and all of the policy in the manner in which that test was done…

[46] The decisions cited above, apart from ***McGuire*** and ***Burdek***, stand for the proposition that as long as a police officer honestly believes that the breath sample result obtained through the use of the ASD is reliable, then the police officer is entitled to rely on the result in forming the requisite grounds to make a breath demand for the approved instrument. An honest belief can exist even if the police officer does not

comply with the operational requirements set out in the Manual and/or has not complied with the training the police officer received, as long as the officer is acting with *bona fides*. It does not appear that the police officer's belief needs to be objectively reasonable, if the objective perspective is based on a consideration of the officer's training and the Manual requirements, as long as it is genuinely held, apparently somewhat contrary to what is said in ***Richardson***. I note that in ***Mcquire*** the issue was the police officer not understanding what the ASD signals were during the administering of the test.

[47] The majority of the Court in ***Bernshaw*** considered ***Richardson***, at para. 54, and the dangers associated with residual mouth alcohol at paras. 55-57. The Court then stated at para. 59:

> 59 If the scientific evidence establishes a high degree of unreliability with respect to the screening device when certain conditions prevail, and if a police officer knows, for example based on his or her training, that the resultant screening device will provide inaccurate results where a suspect has consumed alcohol within the 15 minutes prior to administering the test, how can the police officer testify that he or she had an honest belief of impairment, absent other indicia? Surely the knowledge that the screening test is unreliable would vitiate any subjective belief that an officer may have regarding reasonable and probable grounds of the commission of an offence under s. 253 of the Code. A police officer will have difficulty in concluding that such a flawed test upgrades one's mere suspicion into reasonable and probable grounds. If the police officer is to give an honest answer as to his belief, I cannot see how, as a matter of law, we can tell the officer that the answer is wrong.

[48] In ***Bernshaw***, at para. 7, the Court noted that there "…was no evidence adduced which would indicate that the respondent had taken a drink within 15 minutes prior to taking the ALERT test". ***Bernshaw*** distinguishes between the police officer knowing that the test results will be unreliable due to the presence of residual mouth alcohol,

from instances where the policer officer does not have that actual knowledge of the presence of residual mouth alcohol. If the Court accepts that the police officer honestly believes that the roadside screening test results are reliable, then that belief is not to be further questioned.

[49] Therefore, the that a police officer "ensure" subject suitability, simply means that the police officer be satisfied, in his or her mind, that subject suitability exists. I expect that ignoring very obvious signs, in a manner akin to wilful blindness, would undermine an officer's subjective belief from an objective perspective, but simple mistakes or oversights do not appear to do so. It is the officer's belief that matters, and if that belief is honestly held, even when the circumstances might cast doubt on the objective reasonableness of that belief, then the officer's belief is sufficient. This is the state of the law as I understand it.

[50] I must admit that I have some considerable difficulty with the state of the law in this regard. As a matter of logic and common sense, it would seem to me that if a police officer smells liquor, particularly on a driver's breath, and the driver admits to having consumed alcohol, the police officer would need to inquire into when the last drink was in order to make his or her best efforts to "ensure" subject suitability. Otherwise, the officer is simply guessing or speculating in assuming that the last drink was not within the past 15 minutes.

[51] The generally accepted definition of "ensure" is to make certain of the occurrence of an event, situation or outcome (L. Brown, ed, *The New Shorter Oxford English*

Dictionary, (New York, US: Oxford University Press Inc.) Sub verbo “ensure”). There should not be any guessing in the notion of making certain.

[52] I appreciate that the driver may choose not to respond to the question, or may not be truthful, however, in my opinion, it would make sense to at least ask the question, and then to make the assessment with the additional information, limited as it may be. It is not a difficult or time-consuming thing to do.

[53] I appreciate that a 15-minute delay to “ensure” subject suitability is an inconvenience to the police officer and to the driver, and may trigger other *Charter* issues such as right to counsel in the interim, but there should be no doubt in the mind of the police officer that the subject is suitable before requiring the breath sample into the ASD, and then relying on the result. In ***Schlechter***, at para. 52, citing ***Einarson***, the Court adopts the proposition that a police officer is not wrong in administering the ASD test right away, or in delaying for 15 minutes, as long as the police officer, in each situation, has an honestly held belief in the need to delay the test or not.

[54] It just seems to me, as a matter of logic and common sense, to question how a police officer can be said to have an “honest belief” if the police officer has failed to follow the Manual’s instructions.

[55] It seems that the jurisprudence allows for a police officer to rely on having an “honest belief” regardless of whether the officer is misinformed, underinformed, oblivious to operational instructions and so on, as long as the officer is not blatantly and intentionally ignoring obvious indicators of residual mouth alcohol possibly being

present, such as the driver consuming alcohol in front of the police officer. As stated in ***Schlechter*** at para. 48:

> …The jurisprudence is clear that when an officer has *actual knowledge* of residual mouth alcohol at the time the ASD is administered, either due to the officer having witnessed recent consumption or if the suspect tells the officer he has recently consumed alcohol *and* the officer believes the statement, then the officer cannot honestly believe there are reasonable and probable grounds…

[56] The word "ensure" in the Manual, is therefore not treated as imposing a positive duty on the police officer to take steps to confirm subject suitability in the absence of something readily apparent to the police officer.

[57] It would seem that the decision in ***Burdek*** must therefore not be correct, as the honest belief of the police officer, in that case, was not in doubt; it was simply that the reasonableness of his belief was unfounded as he did not follow the procedure set out in the Standard Field Sobriety Testing Manual. There is no substantive difference between what the officer did in that case and what Cst. Breton did in the present case. Cst. Breton concluded that he had an honest belief to make the ASD demand and rely on the "Fail" result, despite not having taken steps to ensure that the subject was suitable. Mr. Scarizzi emitted an odour of liquor and said he had consumed alcohol. Cst. Breton simply assumed that it had not been within the last 15 minutes with the only basis being that he did not see open liquor in the vehicle. There is no evidence that he looked carefully for open liquor, including the driver's side interior door panel where in many vehicles there is ample room to hide a can of beer or other alcoholic beverage. Mr. Scarizzi's vehicle was not in a remote area far from any possible place where he

could have consumed alcohol within the previous 15 minutes, whether a drinking establishment or a residence.

[58] As stated in ***Schlechter*** at para. 33:

> When assessing the objective reasonableness of an officer's belief, the question is whether on the whole of the evidence adduced, a reasonable person standing in the shoes of the officer would have believed the suspect's ability to operate a motor vehicle was impaired: …

[59] While this paragraph is referring to the belief required for the breath demand for the approved instrument, the same standard should be applied to the reasonableness of the belief that a police officer has to, one, have the requisite suspicion to make the breath demand for the ASD (the mandatory ASD demand excepted) and, two, to rely on the results of the test results from the administering of the ASD.

[60] To me, a reasonable person would expect a police officer to know and to follow the Manual's instructions for the use of the ASD. I would think that the reasonable person would expect the police officer to be conscientious and diligent in adhering to such directions, exigent circumstances aside. A police officer's "adrenaline rush" in a routine traffic stop would not seem to be such an exigent circumstance. Yet the case law clearly does not seem to agree with me on this point. Again as stated in ***Schlechter*** at paras. 44 and 45, referencing ***R.*** v. ***Notaro***, 2018 ONCA 449:

> 44. …The Court of Appeal stated the jurisprudence, properly understood, including *R v Bernshaw* and *R v Einarson*, does not create an obligation on an officer to turn his or her mind to whether there may be residual mouth alcohol. The Court stated that there is no duty to enquire even where the circumstances disclose a possibility that the driver could have consumed alcohol within 15 minutes: *R v Notaro* at paras 22-26. The Court clarified that considering or inquiring about mouth alcohol does not

> operate as a condition precedent for the court's determination of reasonable and probable grounds: *R v Notaro* at para 26.
>
> 45. …I endorse the Ontario Court of Appeal's conclusion that it would be "nonsensical" to hold there is a *Charter* violation when an officer fails to turn his or her mind to a question that he or she has no obligation to ask.

[61] In ***Notaro***, even a concession at trial by the police officer that it would have been prudent for her to have asked Mr. Notaro when his last drink was, did not affect the reasonableness of her actions at the time that she made the ASD demand and administered the test, and her ability to rely on the results of the ASD breath sample, stating at para. 64:

> …What matters is the state of mind of the arresting officer at the time the ASD test is made, and the trial judge was entitled to find that Cst. Kovacic's concession of prudence was based on hindsight at the time of trial.

[62] In my opinion, there is no difference between what Cst. Kovacic said at trial in ***Notaro***, and what Cst. Breton did here. Cst. Breton's admission that he should have asked when Mr. Scarizzi's last drink was, was offered in hindsight at trial, a hindsight that I agree with. However, I find that at the time that Cst. Breton made the ASD demand and administered the test, he honestly believed that there was no residual mouth alcohol present and no other concerns that would impact the suitability of Mr. Scarizzi to provide a breath sample, and thus undermine the reliability of the ASD test results. In law, that is all that is required.

[63] I appreciate that there is no indication in any of the cases cited above that there was expert evidence in the nature of that provided by Cpl. Gottgetreu in this case. I have considered whether, if assuming that there was no such evidence, this could allow

me to distinguish this case from the above jurisprudence. I find that it does not. It is clear that the issue of the risks of the presence of residual mouth alcohol providing a potentially unreliable ASD test result were squarely before the court in these cases, whether placed there by an expert witness or not.

[64] While I have serious concerns about the state of the law on this issue, and find it to be in conflict with what I would consider the correct approach to be in utilizing the ASD in conformity with the instructions in the Manual as to "ensuring" subject suitability has been confirmed, it is the law and I am bound to follow it, insofar as the Supreme Court of Canada has laid it down, and I cannot ignore the persuasive effect of the recent appellate authorities that have followed it.

[65] There is no question in my mind that, if I were determining this issue without the persuasive weight and binding authority of the Appellate and Supreme Court of Canada jurisprudence I have referred to, I would find that Cst. Breton's reliance on the ASD "Fail" result was not reasonable, and therefore the further detention and obtaining of breath samples from Mr. Scarizzi constituted a breach of his ss. 8 and 9 *Charter* rights. I would re-visit what I said many years ago in ***Bonilla***, and would today have decided otherwise.

[66] I have difficulty accepting that the Manual instruction to ensure that the police officer has confirmed subject suitability, is logically coherent with a police officer not having to turn his or her mind to whether there is the possibility of the presence of residual mouth alcohol. I note that in ***Notaro***, at para. 6, the Court states that:

> I accept that before administering an ASD test, arresting police officers properly performing their duty will turn their mind to whether the subject has residual mouth alcohol. If an arresting officer does not do so, the officer may fail to appreciate that the ASD fail result cannot reasonably be relied upon because of information relating to residual mouth alcohol. A prudent officer, intent on doing their duty, will therefore turn her mind to residual mouth alcohol before administering an ASD, but the failure to do so is not a self-standing *Charter* violation.

[67] I appreciate that what is said here is that the whole of the circumstances need to be taken into account, as this is not a free-standing issue. However, read in context of the jurisprudence as a whole, it would appear that it is only a deliberate ignoring of obvious and compelling "in-your-face" observations that would turn prudent action into an obligation. I would have thought that a reasonable member of society would have the expectation that police officers would always act prudently in accord with their duty, allowing some latitude for considering what that would look like where exigent circumstances exist.

[68] However, this appears not to be the case. While Cst. Breton's actions may not have complied with the Manual's instructions, in my mind, they appear to have been in compliance with the existing law.

[69] Therefore, I find that there are no ss. 8 or 9 *Charter* breaches committed in this case on this ground. I note that even if I were to have found there to be such *Charter* breaches, there would have been a strong argument to be made on s. 24(2) *Charter* analysis that the evidence of the breath sample results from the approved instrument should not be excluded due to Cst. Breton acting in accordance with jurisprudence and, in fact, not contrary to the specifics of his training. In this regard, I note that Cst. Allain,

while he personally asks when the last drink a driver had was, does not instruct police officers, including Cst. Breton, that they are required to do so.

[70] I am concerned about Cst. Breton's questionable note-taking practices, and his failure to turn on his microphone, in part at least due to his experiencing an "adrenaline rush". I would like to think that a routine traffic stop would not have that effect on a police officer. However, I find that none of these factors serve to undermine the *bona fides* of Cst. Breton's reliance on the ASD test result of "Fail" in forming the reasonable and probable grounds to make the approved instrument breath demand and require Mr. Scarizzi to accompany him to the RCMP detachment in order to provide a further breath sample.

[71] Therefore, I find that Mr. Scarizzi's ss. 8 and 9 *Charter* rights were not breached and the evidence adduced during the *voir dire* is allowed into the trial proper.

[72] On a further note, I will say that I found Cpl. Gottgetreu's testimony to be compelling, and his methodology and recommendations persuasive. I expect that police officers who adhere to his training approach will find their actions in impaired driving investigations subject to less scrutiny in court.

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COZENS C.J.T.C.