

SUPREME COURT OF YUKON

Citation: *R v Scarizzi*,
2022 YKSC 27

Date: 20220622
S.C. No. 21-AP010
Registry: Whitehorse

REGINA

RESPONDENT

v.

MICHAEL SCARIZZI

APPELLANT

Before Justice K. Wenckebach

Counsel for the Respondent

Sarah Bailey

Counsel for the Appellant

David C. Tarnow

REASONS FOR DECISION

INTRODUCTION

[1] The appellant, Michael Scarizzi, was charged pursuant to ss. 320.14(1)(a) and (b) of the *Criminal Code*, R.S.C., 1985, c. C-46, (the “Code”). At trial, Mr. Scarizzi brought an application alleging that his breath samples were taken in contravention of ss. 8 and 9 of the *Canadian Charter of Human Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the “Charter”). He sought to have the breath samples excluded as evidence.

[2] The trial judge denied the application, and, after trial, found him guilty of driving over the legal limit. Mr. Scarizzi has appealed.

TRIAL JUDGE'S DECISION

[3] At the hearing of the application, the police officer who conducted Mr. Scarizzi's stop, Cst. Marc-Antoine Breton, testified that he was aware that the presence of mouth alcohol could lead to a falsely elevated reading on the ASD. He did not ask Mr. Scarizzi when he had had his last drink of alcohol; if he had anything in his mouth; or if he had smoked in the previous five minutes before administering the Approved Screening Device ("ASD") test on Mr. Scarizzi.

[4] He also testified that he did not see any liquor in the car, any signs that Mr. Scarizzi had been smoking, nor did he have any indication that Mr. Scarizzi had consumed alcohol in the 15 minutes before the traffic stop. Cst. Breton stated that if he had any reason to believe that mouth alcohol might have been present, he would have waited 15 minutes before conducting the ASD test.

[5] Mr. Scarizzi's test registered a fail result.

[6] Mr. Scarizzi called an expert, retired Cpl. Grant Gottgetreu, to testify about the use of ASD tests on individuals suspected of drinking and driving. Mr. Gottgetreu testified that an ASD test is not reliable if the person to whom it is administered has had alcohol within 15 minutes; or smoked or taken something by mouth within five minutes of the test being administered. As Cst. Breton did not determine whether Mr. Scarizzi had done any of these things, the ASD test was unreliable.

[7] The trial judge found Mr. Gottgetreu's testimony compelling. However, he concluded that the law does not require a police officer to ask a suspect these kinds of

questions to establish their suitability for the ASD test. Thus, despite misgivings about the wisdom of the legal test, the judge ruled that the breath samples were admissible.

ISSUES

[8] Mr. Scarizzi submits that the trial judge erred in his decision in the *Charter* application when he determined that Mr. Scarizzi's rights had not been violated and in admitting Mr. Scarizzi's breath samples.

[9] Mr. Scarizzi says that the trial judge misapplied the case law to the facts in this case. First, the case law only addresses whether a police officer is required to ask when the driver had their last drink of alcohol. Second, none of the cases relied upon by the judge had the type of expert evidence provided at Mr. Scarizzi's application.

[10] The issues before me, then are:

- i. Is a police officer required to ask when the driver last drank alcohol; if they had anything in their mouth; and if they smoked in the previous five minutes?
- ii. Did Mr. Gottgetreu's evidence establish that such a duty should be imposed on the police?
- iii. What are the legal requirements of the police in using an ASD when investigating an alcohol related driving offence?
- iv. If the evidence was obtained contrary to the *Charter*, should it have been excluded pursuant to s. 24(2)?

ANALYSIS

- i) Is a police officer required to ask when the driver last drank alcohol; if they had anything in their mouth; and if they smoked in the previous five minutes?

Law

[11] In *R v Bernshaw*, [1995] 1 SCR 254 (“*Bernshaw*”), questions arose about the proper use of ASDs in police investigations of drinking and driving offences. Evidence was lead that a person may have mouth alcohol for 15 minutes after they have had their last drink of alcohol. The presence of mouth alcohol can falsely elevate the reading on a roadside alcohol detection device. Thus, an ASD can provide a false reading for a person who takes the test within 15 minutes of having consumed alcohol. The Supreme Court of Canada examined whether a police officer was required to ask a suspect when they last consumed alcohol. The majority concluded that there is no free standing duty on the police to make such enquiries (p. 298).

[12] The Saskatchewan Court of Appeal reiterated this principle in *R v Schlechter*, 2018 SKCA 45 at para. 81.

[13] In *R v Notaro*, 2018 ONCA 449 (“*Notaro*”), the Ontario Court of Appeal went further. It determined that, as a police officer is not required to ask about when a driver had their last drink of alcohol, they also need not consider the issue of whether the driver had consumed alcohol within the previous 15 minutes before administering an ASD test (at para. 28).

Analysis

[14] In the case at bar the trial judge decided that *Bernshaw* and the subsequent cases applied to the facts before him, and were binding.

[15] However, Mr. Scarizzi submits that the case law is distinguishable because it only dealt with mouth alcohol. It did not address whether a police officer is required to determine if there is something in a person's mouth, or if they have been smoking in the previous five minutes before administering the ASD test.

[16] Crown counsel says that the legal principles cited by the trial judge also apply to questions about whether the person has something in their mouth or if they have smoked in the previous five minutes.

[17] I agree with Crown counsel. In *Bernshaw* the Supreme Court of Canada decided that there was no freestanding duty to inquire about the timing of the suspect's last drink because, as the suspect would not be obliged to answer the question, it would not be proper to impose a duty on the police to ask the question (at p. 298).

[18] This reasoning applies equally to other questions about a person's activities that could affect the results of an ASD test. A driver has no obligation to answer questions about whether they have anything in their mouths or if they smoked within the previous five minutes. There is no obligation for them to open their mouths so a police officer can verify that they have nothing there. It would therefore be improper to impose a duty on the police to take these steps.

[19] Moreover, as noted by the Crown, the court has applied the principles from *Bernshaw* to other circumstances, such as when there were concerns that the ASD machine malfunctioned (*R v McGuire*, 2021 YKSC 45 at paras. 63-64). I therefore find that *Bernshaw* and the subsequent cases are directly applicable to concerns about smoking and whether the suspect has something in their mouth. A police officer is not

required to ask questions to ensure subject suitability, and the trial judge did not err in finding that *Bernshaw* was applicable to the case before him.

- ii) Did Mr. Gottgetreu's evidence establish that such a duty should be imposed on the police?

[20] Mr. Scarizzi's lawyer also submitted that the trial judge erred in relying on the principles established through case law because, here, Mr. Gottgetreu presented compelling evidence that ensuring subject suitability is part of a police officer's duties. That evidence was not presented to the courts in the cases the trial judge relied on, and are therefore distinguishable.

[21] Crown counsel says that the evidence presented at the application is no different than that which was provided in *Bernshaw*. Courts accept that the reliability of ASD machines can be affected by mouth alcohol. The expert evidence presented here does not warrant revisiting the legal principles established in *Bernshaw*.

[22] I conclude that any difference between the evidence here and in *Bernshaw* is not so substantial as to require new legal principles to be developed.

[23] In the case at bar the court had before it Mr. Gottgetreu's testimony and The Alco-Sensor FST® Operator's Manual (British Columbia), 2020-02-18, ("ASD Manual"), which was filed during the hearing of the application (several versions were filed, however, they were all the same on this issue).

[24] Mr. Gottgetreu testified that mouth alcohol, objects in the mouth, or smoking could render an ASD test unreliable. He stated that when he was still an active police officer he required his subordinate officers to ensure subject suitability by asking about when the driver had last consumed alcohol, if they had anything in their mouth, or if they

had smoked within the past five minutes. He would not approve a charge in which the questions were not asked.

[25] He also said that the ASD manual requires police officers to ensure driver suitability before administering the test. He testified that the requirement to do so is not simply about obeying the law, but about being fair.

[26] The Manual states:

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. [emphasis in original, s. 4.5]

[27] The ASD Manual also explains that mouth alcohol and having an object in one's mouth can falsely elevate the results, and that tobacco smoke can damage the fuel cell sensor.

[28] In *Bernshaw* an expert also testified, and a roadside screening device operation manual and the RCMP training course manual ("RCMP Manual") were filed at trial. As in the case at bar, the expert testified that mouth alcohol can provide falsely elevated results. He also testified that police officers were advised to find out when the driver consumed their last alcoholic drink. If they were unable to determine when it occurred, they should wait 15 minutes before administering the roadside test (at p. 263).

[29] The roadside test screening device manual also identified that mouth alcohol can affect a test's results, and stated: "It is important therefore that a period of at least

twenty minutes has elapsed since the subject had his or her last drink” before administering the ASD test (at p. 287).

[30] The RCMP Manual, after having noted the effect of mouth alcohol on ASD tests stated: “As a result, the total time from your initial observation of the person at the vehicle until the time the person blows into the S-L2 should not be less than fifteen (15) minutes” (at para. 56).

[31] Arguably, there is a difference between the present case and *Bernshaw*. Here, Mr. Gottgetreu states that it is mandatory to ask about the three issues that could affect test results, while in *Bernshaw* the advice was either simply to wait 15 minutes, or was not phrased as a requirement, but rather, as a best practice.

[32] I am not convinced that there is a difference between the evidence in *Bernshaw* and the evidence in the case at bar. However, even if there is, the difference is not enough to make *Bernshaw* distinguishable. *Bernshaw* was not decided based on evidence about police officer training. Rather, the court determined that the duties of police officers flowed from the suspect’s rights. Thus, whether a manual or policy requires that a police officer ask certain questions is not the issue. If a person is not required to answer a question, it is not proper to require a police officer to ask the question.

[33] Moreover, the essential issue for the police officer is not whether they meet the requirements of the ASD Manual or police policy in order to demand a breathalyzer. The issue is whether they have reasonable and probable grounds to demand a breathalyzer. That is the legal test, and the standard with which they must comply.

[34] I therefore conclude that the trial judge was correct in finding that *Bernshaw* was binding on him.

iii) What are the legal requirements on the police in using an ASD when investigating an alcohol related driving offence?

[35] In his decision the trial judge disapproved of the law as it stands, and approved of Mr. Gottgetreu's training approach. As his comments may lead to some confusion about the law, it may assist to provide a summary of the law on the use of ASD tests during police investigations under s. 320.14 of the *Code*, and a review of Mr. Gottgetreu's training approach.

[36] The *Code* permits a police officer to administer an ASD test on a person where the police officer has a reasonable suspicion that the person has alcohol in their body (s. 320.27(1)). Section 320.27(2) also permits the police to make a mandatory breath demand of any driver who is lawfully stopped. However, as that was not at issue here, I will make no more reference to it.

[37] The purpose of the ASD test is to assist the police in determining whether there are reasonable and probable grounds to demand a breathalyzer (*Bernshaw*, at p. 285).

[38] Reasonable and probable grounds have a subjective and objective component (at p. 284).

[39] The subjective component is whether the police officer honestly believes that the suspect has committed the offence (at p. 284).

[40] The objective component addresses whether the officer's honest belief is "sufficiently supported by objective information" (*Notaro* at para. 39).

[41] As the ASD helps form reasonable and probable grounds to demand a breathalyzer, unreliable ASD tests can affect the court's conclusions about whether the

police officer had reasonable and probable grounds. Unreliable ASD tests can have an effect on both the subjective and objective components of reasonable and probable grounds, but in different ways.

[42] The subjective component of the test will not be satisfied if the police officer has knowledge or knows facts that would make it obvious that the driver drank alcohol within the previous 15 minutes, has something in their mouth, or smoked in the previous five minutes; knows that those factors can affect the reliability of the roadside test; and did not wait the required time to administer the test. In that case, the police officer cannot say they honestly believed that the suspect committed the offence (*Bernshaw* at p. 289; *Notaro* at para. 38).

[43] Mouth alcohol and the other factors have a larger role to play in assessing the objective component of reasonable and probable grounds. The objective reasonableness of relying on a roadside test can be undermined where the arresting officer had credible evidence that the suspect had mouth alcohol, an object in their mouth, or had smoked within the past five minutes, but administered the ASD test immediately. The determination of whether objective reasonableness is met is done on a case-by-case basis (*Notaro* at para. 39).

[44] Thus, if police officer's subjective belief is not supported by the objective information they have before them, they will not have reasonable and probable grounds to demand a breathalyzer.

[45] There is no legal obligation on the police to ask a suspect about when they last consumed alcohol, if they have an object in their mouth, or if they had a cigarette within the previous five minutes before administering the ASD test.

[46] There is no legal obligation on the police to consider whether there may be reasons that the ASD test would be unreliable before administering it (*Notaro* at para. 30).

[47] However, it is prudent for a police officer to turn their mind to these concerns. A police officer who does consider these issues will be alive to any indications that a suspect may have mouth alcohol, an object in their mouth, or may have smoked in the past five minutes. On the other hand, an officer who does not think about these factors will fail to recognize when it is not objectively reasonable to rely on an ASD result, and may find that their actions are subject to scrutiny (*Notaro* at para. 6).

[48] Ultimately, if the police officer subjectively believes that the suspect has committed an alcohol related driving offence, and the objective information they have sufficiently supports that belief, then they will have reasonable and probable grounds to demand a breathalyzer.

[49] The trial judge also stated that Mr. Gottgetreu's methodology and recommendations were persuasive, and suggested that police officers who follow his recommendations would be subject to less scrutiny in court. With respect, it is my opinion that it is Mr. Gottgetreu's approach that could lead to issues in court.

[50] Mr. Gottgetreu testified that, in his view, it is a requirement to ensure that a suspect is suitable for an ASD test. This means that the police officer is obligated to ask the suspect about when their last drink of alcohol was, whether they have something in their mouth, and whether they smoked in the previous five minutes. The police officer must also ask to look inside the motorist's mouth to ensure they have nothing in it. If the

suspect refuses to answer the question, then the officer is to wait 15 minutes to administer the test.

[51] The most obvious difficulty with this approach is that waiting for 15 minutes if a suspect refuses to answer the question may be contrary to the *Charter*. Under the *Code*, the police are required to demand a breath sample “immediately” (s. 320.27(1)(c)). A police officer who does not seek a breath sample immediately may breach the suspect’s *Charter* rights (*Bernshaw* at p. 273-74). (At the time *Bernshaw* was decided the equivalent provision to s. 320.27 used the word “forthwith” rather than “immediately”. Nothing turns on the change of terminology).

[52] A police officer can delay administering an ASD 15 minutes only if there is some factual basis upon which to suspect that the screening device would provide a false result (at p. 295).

[53] Thus, a police officer who waits 15 minutes to administer the ASD when a suspect refuses to answer their questions may find that their decision is challenged on the basis that they did not administer the ASD test immediately.

[54] I am not saying that such a scenario would breach a suspect’s *Charter* rights; that is not the issue before me. What this example shows, however, is that Mr. Gottgetreu’s approach fails to take into consideration that there are different issues at play during an investigation of alcohol related driving offences, and that, at times, there is a tension in how to resolve those issues in a manner that respects the suspect’s *Charter* rights.

[55] Mr. Gottgetreu's approach elevates the importance of accuracy of the ASD to the exclusion of all the other concerns, and thus may lead to *Charter* scrutiny on other aspects of the investigation.

[56] Taking into consideration the Ontario Court of Appeal's statements in *Notaro*, the best practice is for the police officer investigating an offence under s. 320.14 is to turn their mind to the possibility that the ASD may provide inaccurate results because of mouth alcohol, smoking, or because the suspect has something in their mouth. They must then use their professional judgment in determining if they have reasonable and probable grounds to demand a breathalyzer. It is the context that decides what their next steps should be.

[57] This is what Cst. Breton did, and he committed no legal error.

iv) If the evidence was obtained contrary to the *Charter*, should it have been excluded pursuant to s. 24(2)?

[58] The trial judge did not consider s. 24(2) in great detail, however, he did conclude that the evidence would be admissible even if there had been a *Charter* breach. I agree with the trial judge.

CONCLUSION

[59] I therefore dismiss Mr. Scarizzi's appeal.

WENCKEBACH J.