COURT OF APPEAL OF YUKON

Citation: *R. v. McGuire,*
2023 YKCA 5

Date: 20230605
Docket: 21-YU879

Between:

Rex

Respondent

And

John Harold McGuire

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Smallwood
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of Yukon, dated September 3, 2021 (*R. v. McGuire*, 2021 YKSC 45, Whitehorse Docket 20-AP001).

Counsel for the Appellant: G. Johannson

Counsel for the Respondent: L. Lane

Place and Date of Hearing: Whitehorse, Yukon
May 15, 2023

Place and Date of Judgment: Vancouver, British Columbia
June 5, 2023

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Madam Justice Smallwood

Summary:

The appellant was acquitted of "driving over 80". The Crown appealed the acquittal on grounds that the trial judge erred in his assessment of reasonable grounds. More specifically, he erred in assessing the objective reasonableness of the police officer's reliance on the results of an ASD test. The summary conviction appeal was allowed and a new trial ordered. The appellant seeks to overturn the latter decision, arguing that the summary conviction appeal judge applied an incorrect legal test. Held: Appeal dismissed. The summary conviction appeal court correctly found reversible error and allowed the Crown appeal. The appeal judge erred in her formulation of the governing legal test; however, applying the proper test would have resulted in the same outcome.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] With leave, the appellant, John McGuire, seeks to overturn a Supreme Court of Yukon ruling that set aside an acquittal and ordered a new trial for operating a tractor trailer while over the legal limit, contrary to s. 253(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*].

[2] The offence is alleged to have occurred in October 2017. Since then, the *Criminal Code* has been amended and the equivalent offence is now charged under s. 320.14(1)(b): *Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21.

[3] The primary issue on appeal is whether the summary conviction appeal judge correctly found that the trial judge erred in concluding that the police officer (the "Officer") who arrested Mr. McGuire and made a breathalyzer demand did not have reasonable grounds to do so.

[4] The Officer administered an approved screening device ("ASD") at roadside and relied on a test result of "Fail" in forming her grounds. The trial judge determined that the Officer's reliance on the "Fail" was not objectively reasonable. He also found that without the "Fail", there was no more than a reasonable suspicion that Mr. McGuire had been operating the tractor trailer while impaired by alcohol. The defence brought an application alleging an arbitrary detention and an unreasonable

search and seizure. The trial judge's determination on reasonable grounds resulted in findings of unconstitutional state conduct.

[5] This conduct (as well as a breach of Mr. McGuire's right to counsel), led to the inadmissibility of breath samples that were taken at the police detachment, as well as the related analyses. Without this evidence, the Crown was unable to prove the "over 80" offence and an acquittal followed.

[6] Although I would apply a different analytical approach than the summary conviction appeal judge, I am of the view she correctly found that the trial judge erred in his assessment of reasonable grounds.

[7] Accordingly, I would dismiss the appeal.

Background

[8] Given the narrow issues on appeal, it is not necessary to set out the entirety of the factual background to the case.

[9] The reasons of the trial judge are indexed as 2020 YKTC 32. The facts underlying the Officer's investigation and the information she considered in making an arrest and breathalyzer demand are covered at paras. 5–57.

[10] The reasons of the summary conviction appeal judge (the "SCJ") are indexed as 2021 YKSC 45. Her review of the trial evidence is set out at paras. 7–27.

[11] For present purposes, it will suffice to highlight the findings in the two courts that I consider most salient to the appeal.

Trial Judge

[12] The trial judge found it was reasonable for the Officer to have stopped the tractor trailer operated by Mr. McGuire. The truck matched the "general description" of a vehicle that had been reported as driving erratically, including passing over a double solid line and stopping in the middle of a lane, after which the driver was seen to be stumbling on the side of the road: 2020 YKTC 32 at paras. 86, 5.

[13] The trial judge also found that the driving pattern observed by the Officer "certainly warranted further investigation": at para. 86. This included the tractor trailer's speed fluctuating between 60-80 kilometres per hour. It was seen to cross the centre line and was "jerky" as it went around corners. The tractor trailer did not pull over until the Officer had followed it for five kilometres with her emergency lights and siren activated: at paras. 7–10.

[14] The trial judge accepted the Officer's testimony that she smelled alcohol on Mr. McGuire's breath and observed slurred speech and glossy eyes: at paras. 89–91. He noted that these symptoms are "consistent with the type of symptoms generally observed and associated with impaired driving": at para. 92.

[15] Based on the information relayed to her, and her personal observations, the Officer subjectively believed that Mr. McGuire had alcohol in his body. The trial judge concluded that this belief was objectively reasonable, even without the "driving pattern [that had been] described in the civilian complaint": at para. 98. As such, the Officer's use of an ASD at roadside was valid: at para. 99.

[16] Specific to the ASD, the trial judge accepted that at the start of her shift, the Officer obtained the device from a police locker room and "conducted a preliminary test to satisfy herself that it was working at the time". The "indications to her were that it was": at para. 100.

[17] There were three failed attempts with the ASD before a fourth attempt resulted in a breath sample from Mr. McGuire that was sufficient for analysis: at para. 102. The fourth sample produced a "Fail".

[18] A second police officer who testified at the trial said that after three failed attempts, a properly working ASD will power down and has to be powered back up to receive further samples: at para. 102. The Officer's use of the ASD was audio and video recorded. The trial judge found that the recording did not reveal whether the ASD powered down and had to be restarted after the third failed attempt. Nor was the Officer asked about this fact when testifying: at para. 102.

[19] The trial judge described the Officer's understanding as to how an ASD functions as "somewhat rudimentary": at para. 101. The ASD made various beeping sounds when the Officer was using it. However, she testified that she was not sure what all of the sounds meant. She was "unable to testify as to the various displays that were visible after each of the tests that did not result in a proper sample being received, not having a specific memory or any notes in this regard": at para. 101.

[20] The defence argued that in these circumstances, the Officer "should have been alerted to something possibly not operating as it should with the ASD": at para. 104. As such, it was not reasonable for the Officer to rely on the "Fail" produced by the fourth sample in forming her grounds to arrest Mr. McGuire and make a breathalyzer demand.

[21] Citing the Supreme Court of Canada's decision in *R. v. Bernshaw*, [1995] 1 S.C.R. 254 (S.C.C.), 1995 CanLII 150 at para. 62 [*Bernshaw*], the trial judge held that:

> [118] In order for [the Officer] to rely on the "Fail" results as part of her grounds for arresting Mr. McGuire, she had to reasonably believe that she completed a "properly conducted roadside test" (see *R. v. Gill*, 2011 BCPC 355, at paras. 20 to 21, and *R. v. Baldeon*, 2012 BCPC 8, at paras. 42 to 45 and 63 to 65).
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> [119] There were things that occurred … which should have alerted [the Officer] to a need on her part to ensure the ASD was properly functioning. Because of the lack of a contemporaneous record, or clear recollection on her part as to some of what transpired, which may have been able to address my concern in this regard, I am left with a serious concern about her ability to rely on the ASD "Fail" result in forming her reasonable and probable grounds.
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> [120] Therefore, I am excluding the "Fail" result from her consideration as to whether Mr. McGuire was arrestable for an impaired driving offence.
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> [121] I am further satisfied that without the "Fail" result there is insufficient evidence of other factors indicative of impairment by alcohol consumption such as would have provided [the Officer] with the requisite reasonable and probable grounds to believe Mr. McGuire had committed an impaired driving offence. At most, these only rise to the level of a reasonable suspicion.
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> [122] There is no evidence from [the Officer] that she had formed reasonable grounds to believe Mr. McGuire had committed an impaired driving offence prior to noting the ASD "Fail" result.
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> [Emphasis added.]

[22] On the basis of this conclusion, the trial judge found that Mr. McGuire’s arrest, his subsequent detention, and the taking of two breath samples for analysis violated ss. 8 and 9 of the *Canadian Charter of Rights and Freedom* [*Charter*]. The results of the samples, which put Mr. McGuire’s blood-alcohol concentration over the legal limit, were excluded from evidence under s. 24(2) of the *Charter.*

[23] Although Mr. McGuire had been charged with two offences, operating a motor vehicle while “over 80” and impaired driving, *simpliciter*, the Crown told the trial judge at the start of the trial that it was not seeking a conviction for the second of these offences. Accordingly, the Crown’s inability to rely on the breath samples as evidence meant that it had no case against Mr. McGuire and an acquittal was entered.

Summary Conviction Appeal Judge

[24] The Crown appealed the acquittal on two grounds: (1) that the trial judge erred in his assessment of reasonable grounds; and (2) that he erred in excluding the breath samples and related analyses from evidence.

[25] For the first of these grounds, the SCJ applied a correctness standard of review: 2021 YKSC 45 at para. 44. The parties agree this was the proper standard: *R. v. Shepherd*, 2009 SCC 35 at para. 20 [*Shepherd*].

[26] The SCJ held that in the absence of credible evidence of an ASD’s unreliability, the Crown is not required to prove that the ASD was in “good working order” before a police officer can rely on the results: at para. 62. On appeal, the appellant takes no issue with this proposition.

[27] The SCJ then held that:

> [51] The trial judge erred in finding that the unexplained irregular beeping before and during the insufficient attempts [to blow into the ASD], the absence of evidence of whether the machine shut off and was turned back on again after the third insufficient attempt, and the lack of any notes or recall of the officer about the displays or temperature on the machine, <u>amounted to credible evidence that the ASD was not working properly</u>.
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> [52] <u>There was no evidence provided by either the Crown or defence to show that the beeps indicated a malfunction</u> … The defence did not introduce

> any evidence that the beeps heard on the audio-recording played at trial showed evidence of ASD malfunction.
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> [53] … the unavailability of information on the reasons why the first three breath samples were insufficient was not credible evidence that the ASD was not working.
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> …
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> [55] … the deficiency of evidence [about whether the ASD shut off after the third insufficient sample and the Officer had to turn it on again] did not contribute to credible evidence of the ASD's poor working order.
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> [56] … There was no evidence that [the fourth sample] was compromised either through irregular beeping or any other unusual aspects.
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> [57] … [Testimony] confirmed that if the ASD had not been calibrated properly, it would have locked the user out. There is no evidence that this occurred.
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> …
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> [61] … there [was] no scientific evidence of a high degree of unreliability of the ASD as a result of irregular beeping before and during some of the insufficient attempts of [Mr. McGuire] to blow. Without that scientific evidence of a high degree of unreliability, there is no basis to question the objective reasonableness of the officer's reliance on the "fail" result. Notes or an explanation from the officer is not a requirement for the purpose of establishing reliability, where there is no credible evidence of reliability.
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> [Emphasis added.]

[28] The SCJ described the "burden to establish a high degree of unreliability" as a "heavy burden": at para. 67. She concluded that in this case, there was no "specific proof of the ASD's unreliability": at paras. 68, 73. There was no evidence that the "Fail" was actually "compromised by the beeping or the inability of the [Officer] to explain it fully or recall the display codes before and during some of the insufficient attempts": at para. 68. Instead, the trial judge "was left to speculate about the significance of the beeping sounds, or the displays generated, or the temperature of the ASD because there was no evidence that linked those factors to improper working": at para. 68. A finding that it was "possible that a well-functioning ASD at the outset might stop functioning at some point, does not meet the required legal standard": at para. 70.

[29] In light of the trial judge's error, the SCJ determined that she could revisit the s. 24(2) *Charter* analysis. She did so and decided that she would not exclude the breath samples taken at the police detachment.

[30] Accordingly, the breath samples and the related analyses were available to the Crown as evidence. The SCJ ordered a new trial.

Issues on Appeal

[31] The principal question on appeal is whether the SCJ correctly found that the trial judge erred in his assessment of reasonable grounds.

[32] Mr. McGuire raises two issues in this regard. First, he says the SCJ applied an improper test when reviewing the trial judge's finding on reasonable grounds. Second, Mr. McGuire contends that the SCJ went too far in her review. She did not adhere to a correctness standard. Instead, she reweighed the trial evidence and substituted her own factual findings for those of the trial judge. This she was not allowed to do. Although a correctness standard applied, the SCJ was obliged to defer to the findings of fact that underlay the reasonable grounds determination.

[33] Mr. McGuire has not appealed the SCJ's s. 24(2) *Charter* analysis. As such, if this Court finds that the SCJ did not err in overturning the reasonable grounds determination, the order for a new trial must stand.

Discussion

[34] A police officer who believes on reasonable grounds that an individual has committed an offence under s. 253(1) of the *Criminal Code* (now s. 320.14(1)), may arrest that individual and demand that they provide samples of their breath for analysis: *Criminal Code,* s. 254(3)(a)(i) (now s. 320.28(1)(a)(i)). Depending on the results of the analysis, the breath samples may be used as evidence in a prosecution.

[35] The grounds for the arrest and the breathalyzer demand must be subjectively held and objectively reasonable: *Shepherd* at para. 17. The onus is on the Crown to prove that the police officer had reasonable grounds: *Shepherd* at para. 16.

[36] It is not uncommon in impaired driving investigations for a police officer to use an ASD as an investigative tool at roadside. At the time of the investigation involving

Mr. McGuire, the authority to do so was found in s. 254(2)(b) of the *Criminal Code*. The relevant provision is now s. 320.27(1)(b).

[37] The results generated by the ASD may form part of the circumstances considered by a police officer in deciding whether they have sufficient grounds for an arrest and breathalyzer demand. As noted by the majority in *Bernshaw*, the purpose of the ASD in this context is to "assist police in furnishing the reasonable grounds necessary to demand a breathalyzer": 1995 CanLII 150 at para. 49. The ASD provides a "convenient tool for confirming or rejecting a suspicion regarding the commission of an alcohol-related driving offence": at para. 49.

[38] Writing for the majority in *Bernshaw*, Justice Sopinka held that a "Fail" on an ASD is not "sufficient to constitute [reasonable grounds], *per se*, where a police officer is aware of circumstances that make the results of the test unreliable": at para. 45, emphasis added.

[39] This is because:

> [59] … the knowledge that the screening test is unreliable would vitiate any subjective belief that an officer may have regarding [reasonable grounds] of the commission of an offence … A police officer will have difficulty in concluding that such a flawed test upgrades one's mere suspicion into [reasonable grounds]. If the police officer is to give an honest answer as to [their] belief, I cannot see how, as a matter of law, we can tell the officer that the answer is wrong.
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> [60] … a "fail" result *per se* is insufficient to furnish [reasonable grounds] where circumstances exist … such that the police know that the test would yield faulty results.
>
> [Emphasis added.]

[40] Justice Sopinka went on to hold that: "Where the particular screening device used has been approved under the statutory scheme, the officer is entitled to rely on its accuracy unless there is credible evidence to the contrary": *Bernshaw* at para. 80, emphasis added.

[41] What constitutes "credible evidence to the contrary" in this context has been a matter of some debate.

[42] For present purposes, it is not necessary to canvas all of the relevant authorities. Instead, I will focus on the ones that I find most instructive in answering the specific question that arises here. I would frame that question this way: whether "credible evidence to the contrary" must establish an actual malfunctioning of the ASD used in the investigation, or, the inquiry is more appropriately focused on what is known to the police officer at the time they choose to rely on the ASD result, and the impact of that knowledge on the objective reasonableness of their subjective belief in grounds for an arrest and/or a breathalyzer demand.

[43] As I will endeavour to explain, it is my view that the *Bernshaw* reference to "credible evidence to the contrary" is properly focused on the second of these two scenarios.

[44] In *R. v. Jennings*, 2018 ONCA 260 [*Jennings*], the Ontario Court of Appeal reviewed *Bernshaw* and held that a police officer's failure to follow a policy or an operator's manual specific to an ASD does not "automatically render" their reliance on the results produced by the ASD objectively unreasonable: at para. 17. Nor does a choice to perform a self-test of the ASD at roadside rather than at the beginning of a police officer's shift: at para. 18. A failure to record the calibration particulars of an ASD will not "automatically" render reliance on the ASD unreliable: at para. 19. Nor will the failure to perform a second self-test after having obtained a sample, so that the police officer can confirm the ASD remains in working order: at para. 21.

[45] Why is this so? Because whether the ASD was, in fact, properly functioning at the time of its use, or whether a police officer did everything they were trained to do to verify that the device was operating correctly, is not dispositive of the issue. Rather, what matters for the "credible evidence to the contrary" inquiry is whether there were circumstances <u>known</u> to the police officer when they elected to rely upon the ASD result that would give the officer "<u>reason to believe</u>" the ASD was not in proper working order: *Jennings* at para. 21, emphasis added. The "evidence to the contrary" inquiry is focused on the reasonableness of the police officer's belief about the reliability of the ASD result and the choice to rely upon it, not whether the results were reliable, in fact.

[46] In *R. v. Notaro*, 2018 ONCA 449 [*Notaro*], the Ontario Court of Appeal had another occasion to address *Bernshaw* and made this same point.

[47] Writing for the Court, Justice Paciocco explained that whether reasonable grounds exist in a given case is determined "according to the subjective belief of the arresting officer, and whether, on the information known to the officer, that belief is reasonable": at para. 33, emphasis added. Consequently:

> [38] … if an officer knows of facts that would make it obvious that an ASD fail result would be unreliable because of residual mouth alcohol, any claim by that officer that [they] honestly believed the ASD fail result showed that the driver was committing an offence is not apt to ring true. A court may choose not to accept the officer's testimony that she had the required subjective belief.
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> [39] … To determine whether the subjective belief was objectively reasonable, a court looks at the information or "grounds" that the arresting officer had, to see whether a reasonable person, standing in the officer's shoes would be able to come to the same conclusion …
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> [40] The proper question in an objective [reasonable grounds] analysis is not, therefore, the generic one of whether an arresting officer conducted a reasonable investigation. Rather, it is the pointed one of whether the officer acted on reasonable grounds. It follows that the outcome of the objective test … turns on the information the officer knew at the time of the evidential breath demand or arrest.
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> [41] It has therefore been accepted that the objective reasonableness of relying on an ASD fail result to form [reasonable grounds] for an arrest and evidential breath demand can be undermined, on a case by case basis, by credible evidence known to an arresting officer that the suspect had residual mouth alcohol at the time of testing …
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> [Internal references omitted, emphasis added.]

[48] In my view, *Jennings* and *Notaro* correctly analyze and apply the meaning of "credible evidence to the contrary" as that phrase is used in *Bernshaw*.

[49] I consider it clear from paras. 51, 59, 80–82 and 84–85 of *Bernshaw* that the "credible evidence to the contrary" inquiry does not ask whether there is positive proof of the ASD having malfunctioned in the investigation that gave rise to the prosecution. Rather, the analysis examines the information known to the police officer at the material time (which may or may not include actual or an apparent malfunctioning of the device), and asks whether the known information credibly

negates or undermines the objective reasonableness of the police officer's belief in, and reliance upon, the ASD results.

[50] The essence of *Bernshaw*'s majority ruling was stated this way in *R. v. Gundy,* 2008 ONCA 284: "… where the officer is aware that the results of the approved screening device are unreliable because of the circumstances in which the test was administered, then the officer cannot have the requisite subjective belief": at para. 41, emphasis added. I find this to be a helpful way of framing the issue.

[51] The following passage from *R. v. Black*, 2011 ABCA 349, leave to appeal to SCC ref'd, 34648 (26 April, 2012), is also instructive:

> [44] The ASD's role in establishing an over .08 offence is that it provides officers with the means to gain the reasonable and probable grounds necessary to demand a breathalyzer test. If the officer reasonably suspects that a motorist has alcohol in his or her body, the officer may demand that the motorist provide a breath sample into an ASD: *Criminal Code*, s. 254(2)(b). A fail result on a properly conducted ASD test constitutes reasonable and probable grounds to demand a breathalyzer test: *Bernshaw* at para 49. There is no requirement that the ASD be proven to be working properly: *R. v. Arthurs* (1981), 12 Sask. R. 95, 63 C.C.C. (2d) 572 (Sask. C.A.); *R. v. Yurechuk* (1982), 42 A.R. 176, 23 Alta. L.R. (2d) 136 (Alta. C.A.). So long as the ASD has been approved under the statutory scheme, the officer can reasonably and honestly rely on its accuracy unless there is evidence that the officer knew or believed that it was not working properly: *Bernshaw* at para 80.
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> [Emphasis added.]

See also, *R. v. Biccum*, 2012 ABCA 80 at paras. 17, 20–31.

[52] What these cases tell us, is that where the evidence adduced at a trial (whether by the Crown or the defence), reveals information known by the investigating police officer that, because of the circumstances in which the ASD was administered, credibly undermines or negates the reliability of the "Fail", it will render the police officer's reliance on that test result objectively unreasonable. If that happens and the "Fail" forms the sole basis for, or a substantial part of, the police officer's grounds for an impaired driving related arrest and breathalyzer demand, the arrest and breathalyzer demand are likely to be found unlawful because without the "Fail", there would be an insufficient basis for establishing reasonable grounds.

[53] This is a case-by-case determination and necessarily informed by the whole of the circumstances surrounding the use of the ASD, the information known to the police officer at the material time, the police officer's subjective belief in the reliability of the ASD result, and the extent to which that belief and consequent reliance played a role in the formation of grounds for an arrest and breathalyzer demand.

[54] Applying the *Jennings* and *Notaro* interpretation of *Bernshaw*, with which I agree, I am satisfied the SCJ was correct to find that the trial judge erred in his assessment of reasonable grounds.

[55] On a fair reading of the trial judge's reasons, his conclusion that the Officer's reliance on the ASD "Fail" was not objectively reasonable was grounded in two main factors: (1) that "things [had] occurred" which should have alerted the Officer to a need to ensure the ASD was properly functioning; and (2) a "lack of a contemporaneous record, or clear recollection on her part as to some of what transpired": at para. 119.

[56] In my view, neither of these factors, individually or in their cumulative effect, provided "credible evidence to the contrary" that negated or undermined the objective reasonableness of the Officer's reliance on the "Fail". There was no evidence of information known to the Officer that would have credibly rendered it apparent to her that the "Fail" could not be relied upon in deciding whether she had grounds to arrest and make a breathalyzer demand.

[57] The Officer testified that she was trained on the use of the ASD that she administered. She believed the ASD was "operating correctly and that it was functionable". Consistent with her usual practice, she checked the expiry date of the device at the start of her shift and she provided a sample of her own breath to make sure it was operating correctly.

[58] The Officer understood that the proper operation and use of an ASD is necessary to obtain a reliable result. She appreciated that the device is not infallible. She understood that if an ASD has not been calibrated as required, the operator will be locked out. She also understood that an ASD will not operate outside of a certain

temperature range. There was no suggestion, in the evidence, that either of these scenarios occurred during the investigation of Mr. McGuire.

[59] The Officer was aware that there were three insufficient ASD samples. However, based on her observations of Mr. McGuire while he was blowing into the device, she believed that this situation arose because he "did not provide enough air into the instrument for it to give a reading". It was not suggested to her, in cross-examination, that the three insufficient samples were indicative of device error.

[60] The Officer testified that she was looking at the ASD while engaged with Mr. McGuire. In other words, she was paying attention to it. During her interaction with Mr. McGuire, she changed the mouthpiece and cleaned it. When asked about the meaning of the various beeping sounds that occurred while administering the ASD, the Officer was not able to explain all of them or to recall the wording of the specific messages or abbreviations that would have appeared on the ASD in response to the insufficient blows. She did not record them. However, she was not asked, in cross-examination, whether the beeping sounds were indicative of device error. To the contrary, in re-examination, the Officer was asked what impact the insufficient samples and the beeping sounds had on her "reliance on the reliability of the … fail reading". She responded: "Just leading up, it just showed that it was working properly" (emphasis added).

[61] The Crown called a police officer at the trial who trains ASD operators and calibrators. He was not present when the Officer administered the ASD. He testified that an ASD "produces various sounds" when operating. However, he was not asked to explain what those sounds represent, or, importantly, whether the beeps that occurred in this case were indicative of device error. This witness said that after three "attempts", an ASD will produce the message "Flow Void" and then "powers down". However, it does not "lock out" the administrator. It "just turns itself off". The Officer was not asked in her testimony whether the ASD powered down while she was using it and had to be restarted. As such, there was no evidence about whether this did or did not happen. Indeed, in his reasons, the trial judge acknowledged that

he could not say “with certainty” that the ASD failed to power down after the three attempts as would ordinarily be expected: at para. 102.

[62] The SCJ held there was “insufficient credible evidence of the unreliability of the ASD” for the trial judge to find that the Officer’s subjective belief in the reliability of the ASD result was objectively unreasonable: at para. 78. There was no indication that the “Fail” was “compromised by the beeping or the inability of the [Officer] to explain it fully or recall the display codes before and during some of the insufficient attempts”: at para. 68. It “is not enough for the accused to raise a question about the possibility of the ASD being unreliable”: at para. 68, emphasis added. There was “no scientific evidence that the beeping created an inaccuracy in the fail result: at para. 73.

[63] Mr. McGuire says that in finding error, the SCJ applied an incorrect approach. An accused does not have to adduce “scientific evidence of a high degree of unreliability” specific to the ASD before a trial judge can find that it was not objectively reasonable for the officer to rely on a “Fail” reading. That is not what “credible evidence to the contrary” requires. Nor does an accused bear a “heavy burden” in raising this issue to challenge the objective reasonableness of a police officer’s subjective belief in reliability. Instead, a trial judge has “significant leeway … to determine what is and what is not evidence to the contrary”: appellant’s factum at para. 39. And, says Mr. McGuire, this can include evidence of a police officer’s lack of knowledge about the ASD, how it operates, or evidence that the police officer did not pay close attention to whether the device was operating properly at the material time.

[64] The Crown disagrees. It says the SCJ was correct to find that there was “no credible evidence the [ASD] was malfunctioning or being misused”: respondent’s factum at para. 27. From the Crown’s perspective, the *Bernshaw* inquiry is not about whether a police officer is able to explain the various functions of the ASD or how the device operates. Rather, to displace a police officer’s entitlement to rely on ASD results, the defence must point to “positive evidence of inaccuracy”: respondent’s factum at para. 34.

[65] As stated, I am satisfied the SCJ correctly found that the trial judge erred in his assessment of reasonable grounds. There was no evidence of information or facts known to the Officer that would credibly undermine or negate the reliability of the ASD results and the Officer's belief in them, such that the use of those results in forming her grounds for an arrest and breathalyzer demand was objectively unreasonable. On this evidentiary record, a reasonable person standing in the Officer's shoes and knowing what she knew would not question the reliability of the ASD result: *Notaro* at paras. 38–41. I agree with the SCJ that the trial judge's determination to the contrary was speculative. Mr. McGuire accepts that speculation cannot ground an "evidence to the contrary" finding.

[66] However, in upholding the SCJ's conclusion on this point, I do not endorse her interpretation of what constitutes "credible evidence to the contrary". I do not agree that an individual who is prosecuted for an impaired driving-related offence can only challenge the objective reasonableness of a police officer's reliance on a "Fail" through the use of "scientific evidence of a high degree of unreliability of the ASD": at para. 61.

[67] I agree with Mr. McGuire that this is too high of a threshold, and, in my view, it is not the evidential burden contemplated by *Bernshaw*. What is required is evidence of facts, information or circumstances known to the police officer at the material time that credibly negates or undermines the objective reasonableness of their reliance on the ASD results.

[68] I agree with Mr. McGuire that trial judges have "leeway" in deciding, within the context of a particular case, whether there is evidence in the record that meets the test for "credible evidence to the contrary". In some cases, that evidence may include expert opinion evidence about the unreliability of the ASD in question, which is then linked to circumstances known to the officer at the time of their reliance on the test result. In other cases, there may not be expert opinion evidence. Instead, the "credible evidence to the contrary" will arise solely from the circumstances surrounding the use of the ASD, what the police officer (or others) may or may not have noted about the device as it was being administered, or external variables

(such as the known presence of residual mouth alcohol), that would credibly undermine or negate reliance on the test result. There are no closed categories. However, the focus of the inquiry must be on the reasonableness of the police officer's belief about and reliance upon the ASD result, as informed by the circumstances that were known to them when they make their arrest and the breathalyzer demand.

[69] In this case, Mr. McGuire pointed to the beeping sounds that occurred while the police officer was administering the ASD as something within the knowledge of the Officer that credibly undermined or negated the objective reasonableness of her reliance. However, on the evidence called in this case, the meaning of those sounds was equivocal and as equally consistent with the device working as it should. That is how the Officer interpreted the sounds and there was no contradictory evidence.

[70] A failure to power down after three insufficient breath samples, which might be indicative of device error, was not established on the evidence. The record was silent on this point. It would have been speculative for the trial judge to fill the evidentiary gap.

[71] Finally, the failure to make notes of what was happening with the ASD as it was administered, or the messages it produced, is not a best practice. However, standing alone, this was not evidence that would credibly undermine or negate the objective reasonableness of the Officer's belief in the context of the record as a whole. This included evidence of specific steps taken to verify that the ASD was working; an acknowledged awareness and understanding of things to watch for; monitoring the device and Mr. McGuire's interaction with it while it was being administered; and a stated belief, as someone who is trained in the use of an ASD, that it was "working properly".

[72] I would not accede to this aspect of Mr. McGuire's appeal.

[73] That takes me to the remaining issues.

[74] In my view, there is no merit to Mr. McGuire's suggestion that the SCJ exceeded her authority as a reviewing court, reweighed the evidence, and made her own findings of fact. In applying the correctness standard to the trial judge's reasonable grounds assessment, the SCJ was entitled to "engage in a *de novo* analysis and thereby substitute [her] own view of the correct answer for the trial judge's legal conclusion": *R. v. MacKenzie*, 2013 SCC 50 at para. 54. She was entitled to "review the underlying factual foundation of [the] case" (*Shepherd* at para. 20), and to determine whether, at law, that foundation met the test for reasonable grounds. On a fair reading of the SCJ's reasons, as a whole and in context, this is all she did.

[75] Finally, the Crown argued that if the trial judge was correct to hold that the Officer could not rely on the ASD results, the remainder of the information the Officer took into consideration in forming her grounds for arrest and a breathalyzer demand was sufficient to meet the test for reasonable grounds. In other words, the unavailability of the "Fail" does not make a difference. For reasons that are self-evident, it is not necessary to address this argument.

<u>Disposition</u>

[76] For the reasons provided, I would dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Smallwood"