

SUPREME COURT OF YUKON

Citation: *R v Schmidt*,
2024 YKSC 18

Date: 20240430
S.C. No. 23-AP007
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

APPELLANT

AND

NICHOLLIS SCHMIDT

RESPONDENT

Before Justice K. Wenckebach

Counsel for the Appellant

Mark Friedman (by videoconference)

Counsel for the Respondent

Ellen Bolger (by videoconference)

REASONS FOR DECISION

Overview

[1] Nichollis Schmidt was charged with driving while intoxicated, pursuant to s. 320.14(1)(a) and (b) of the *Criminal Code of Canada*, RSC 1985, c C-46 (“*Criminal Code*”). At trial, he brought *Charter*¹ applications on a number of issues and sought that the results from the breath tests the police took before charging him be excluded as evidence. The trial judge found that the police had violated Mr. Schmidt’s rights and excluded the evidence of the breath tests. Mr. Schmidt was then acquitted. The Crown now appeals the court’s decision.

¹ *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the “*Charter*”)

[2] The facts leading to the charges are that, on June 5, 2021, Constable Cook and Constable Fox responded to a call from a complainant, who reported that there was a truck running outside her house, with a male passed out in the truck. The complainant stated that the truck had been running for about two hours, and that the person in the truck was possibly intoxicated.

[3] When Constable Cook and Constable Fox arrived at the scene, they found the truck still running. Mr. Schmidt was asleep in the driver's seat. The driver's door was open. At least one of Mr. Schmidt's legs was hanging out, resting on the door sill. Mr. Schmidt had blue paint on his face. Constable Cook had difficulty waking Mr. Schmidt but was able to after he applied a pressure point behind Mr. Schmidt's ear. Constable Cook asked Mr. Schmidt how many drinks he had had. He recalled that Mr. Schmidt told him that he had three drinks.

[4] While Constable Cook was speaking to Mr. Schmidt, Constable Fox went to the back of the truck to get the licence plate number. He overheard Constable Cook ask Mr. Schmidt how many drinks he had and heard Mr. Schmidt say he had three drinks, four hours ago. Constable Fox, who was the lead investigator, went to the driver's side of the truck and asked Mr. Schmidt the same question. Mr. Schmidt repeated his answer.

[5] Constable Fox then went to his own car and got his Approved Screening Device for obtaining breath samples. He returned to Mr. Schmidt's truck and administered the ASD to Mr. Schmidt. Mr. Schmidt registered a "fail" reading. Subsequently, after further investigation, Mr. Schmidt was charged with the offences.

[6] Constable Fox made the ASD demand pursuant to s. 320.27(1) of the *Criminal Code*. Under s. 320.27(1), a police officer may demand breath samples from a person where the police officer “has reasonable grounds to suspect” that the person has alcohol in their body and operated a conveyance, such as a car, within the last three hours. A police officer making the demand must do so immediately.

[7] At trial, three of the issues the judge decided were whether the police had reasonable grounds to suspect that Mr. Schmidt had alcohol in his body; whether the police could rely on s. 320.27(2) of the *Criminal Code* (which does not require reasonable suspicion to demand a breath sample) as an alternative ground for justifying the breath demand; and whether the police made the demand for the breath sample immediately.

[8] The trial judge determined that Constable Fox did not have reasonable suspicion that Mr. Schmidt had alcohol in his body; the police could not rely on s. 320.27(2) as grounds for obtaining the breath sample; and Constable Fox did not make the demand for the breath sample immediately. On those bases, the judge found there were *Charter* violations and excluded the evidence of the breath tests. The Crown argues on appeal that the judge erred in making these determinations.

Issues

[9] The issues on appeal are, therefore:

- A. Did the trial judge err in determining that Constable Fox did not have reasonable suspicion that Mr. Schmidt had alcohol in his body?;

If I decide that the trial judge did not err, I must consider:

- B. Did the trial judge err in determining that the police could not rely on s. 320.27(2) to justify the demand; and

- C. Did the trial judge err in determining that Constable Fox violated Mr. Schmidt's rights under s. 10(a) of the *Charter* by not making the breath demand immediately?

Analysis

- A. Did the trial judge err in determining that Constable Fox did not have reasonable suspicion that Mr. Schmidt had alcohol in his body?

[10] I conclude that the trial judge erred in his decision. I also conclude Constable Fox had reasonable suspicion that Mr. Schmidt had alcohol in his body.

Trial Decision

[11] At trial, Constable Fox testified that he formed a reasonable suspicion that Mr. Schmidt had alcohol in his body because Mr. Schmidt said he had three drinks four hours ago. The trial judge accepted there were additional factors that could have provided grounds for suspecting that Mr. Schmidt had alcohol in his body. These factors were: the length of time the vehicle had apparently been left running; when the police arrived, Mr. Schmidt was asleep, and the driver's door was open; the blue paint on Mr. Schmidt's face; and the difficulty the police had in waking him up. However, Constable Fox did not testify that these factors contributed to his suspicion. He only testified that it was Mr. Schmidt's statement that provided reasonable suspicion.

[12] Constable Fox's evidence thus raised two questions at trial. First was whether, in determining whether Constable Fox had reasonable suspicion, the trial judge should take into account the other factors indicating Mr. Schmidt may have alcohol in his body, or whether the court could only consider Mr. Schmidt's statement. Second, if the court

could only consider Mr. Schmidt's statement about his alcohol consumption, whether that factor alone was sufficient to raise a reasonable suspicion.

[13] The general legal principles about reasonable suspicion were not at issue at trial. Reasonable suspicion is composed of two components: the subjective element and the objective element. The subjective element is met when the police officer has an "honest belief" (*R v Bernshaw*, [1994] SCJ No 87 at para. 48) that there are sufficient grounds for reasonable suspicion. The objective element is "...the constellation of facts [...] based in the evidence, tied to the individual, and capable of supporting a logical inference" that the person has alcohol in their body (*R v Chehil*, 2013 SCC 49 at para. 46).

[14] The trial judge implicitly accepted that Constable Fox subjectively believed he had reasonable suspicion. On the objective component, the judge decided he could only consider the factors Constable Fox, himself, cited as forming the basis for his reasonable suspicion. In this case, that was Mr. Schmidt's statement about his alcohol consumption.

[15] The court then considered whether Mr. Schmidt's statement that he had three drinks, four hours previously, was sufficient to meet the reasonable suspicion standard. He concluded it did not. Thus, he found that Constable Fox did not have the authority to make a breath demand.

[16] The Crown submits that the trial judge erred when he concluded he could only consider whether Mr. Schmidt's statement about his alcohol consumption in his assessment of reasonable suspicion; and that Mr. Schmidt's statement was insufficient to raise a reasonable suspicion. I will therefore address these two issues. If, however, I

conclude the trial judge should have considered the other factors in his determination of reasonable suspicion, then that will be sufficient to resolve the issue. It will not be necessary to also decide whether Mr. Schmidt's statement about the amount he had to drink is sufficient to form reasonable suspicion.

Factors Used in Determining Reasonable Suspicion

[17] The Crown submits that the trial judge was required to take all the circumstances known to Constable Fox into account in determining whether he had a reasonable suspicion. This included Mr. Schmidt's statement that he had three drinks four hours before, but also included the report that Mr. Schmidt's truck had been idling for approximately two hours, that he was asleep with the truck door open, had blue paint on his face, and was difficult to rouse. Taking into account the full constellation of facts, the Crown argues that both the subjective and objective component of reasonable suspicion were met.

[18] Mr. Schmidt's counsel submits that the trial judge was correct in relying only on the statement of alcohol consumption to determine reasonable suspicion. The objectively discernible facts may have supported a reasonable suspicion, but they cannot be used to change the officer's testimony to support the basis for that officer's suspicion.

[19] I conclude that the trial judge erred by determining whether Constable Fox had reasonable suspicion only based on Mr. Schmidt's statement of how much he drank.

[20] This issue has been considered by the Ontario Court of Appeal in *R v Fyfe*, 2023 ONCA 715 ("*Fyfe*"). *Fyfe* was decided after the trial court in this case rendered its decision. The court in *Fyfe* found that, in the case law, discussions of the objective

element suggest that the assessment of the element is not based on the point of view of the police officer who administered the breath test, but on all the facts reasonably known to the police officer at the time (at para. 62).

[21] It furthermore noted that, at times, the court is asked to take into account facts or circumstances that would undermine the objective reasonableness of the police officer's suspicion, even where the police officer had not considered the factor. It reasoned that, by the same token, the court should take into account those facts that support the objective reasonableness of the suspicion, even if the police did not use those factors in their own assessment of reasonable suspicion (*Fyfe* at para. 61). The court stated at para. 60: "To restrict the evaluation of the circumstances to an assessment of the reasonableness of only the officer's articulated grounds and not all of the circumstances known to the officer would have the obtuse result of rewarding an officer's tunnel vision. ...". It then concluded at para. 61: "...not considering the broader circumstances would undermine the objective part of the review of reasonable and probable grounds."

[22] I find the Court of Appeal for Ontario's analysis persuasive and adopt it here. Thus, to determine reasonable suspicion, it was necessary to consider all the facts Constable Fox knew at the time. Taken together, the facts were sufficient to conclude that Constable Fox had reasonable suspicion and could make the demand for a breath test. Constable Fox did not violate Mr. Schmidt's *Charter* rights on this ground.

[23] Because I have concluded that all the circumstances known to Constable Fox are to be considered in determining reasonable suspicion, I will not address whether Mr. Schmidt's statement about his alcohol consumption was sufficient to establish reasonable suspicion.

B. Did the trial judge err in determining that the police could not rely on s. 320.27(2) to justify the demand?

[24] Because I conclude the police had reasonable suspicion to make the demand under s. 320.27(1), I also need not decide if the police could rely on s. 320.27(2) to justify the demand.

C. Did the trial judge err in determining that Constable Fox violated Mr. Schmidt's rights under s. 10(a) of the *Charter* by not making the breath demand immediately?

[25] I conclude that Constable Fox made the breath demand immediately and in accordance with the requirements of s. 10(a) of the *Charter*.

Trial Decision

[26] When immediacy is at issue, the sequence and timing of a roadside investigation may be important. Here, the evidence was that Constable Cook asked Mr. Schmidt how much he had to drink; Constable Fox returned to the driver side door of the truck "less than a minute" later; then, Constable Fox asked Mr. Schmidt the same question.

[27] After asking the question, Constable Fox went to the police car and returned to the truck with the ASD. The court determined it took about 36 seconds for Constable Fox to speak to Mr. Schmidt, go to his car and return. The total time lapsed between when Constable Cook asked his question and when Constable Fox had the ASD at Mr. Schmidt's truck was about a minute to a minute and half. Less than five minutes passed between Constable Cook asking Mr. Schmidt how much he had to drink and Mr. Schmidt giving his breath sample.

[28] The trial judge found that reasonable suspicion arose once Constable Cook asked Mr. Schmidt how much he had to drink. The requirement to make the breath demand arose at the same time.

[29] The trial judge then considered when Constable Fox made the demand. He concluded that it was not clear when this occurred. It may have been immediately after Constable Fox asked Mr. Schmidt how much he had to drink; or it may have been upon Constable Fox's return to the truck with the ASD. The judge reasoned that either way, he made the demand too late. The police therefore violated Mr. Schmidt's rights to be informed that he was detained, and the reasons for his detention, under s. 10(a) of the *Charter*. The *Charter* violation made the demand and administration of the ASD unlawful.

Legal Principles

[30] The requirement that an ASD demand must be made immediately has a constitutional element to it. This is because, as drivers must also "immediately" provide a breath sample upon the demand being made, they must provide the breath sample without having the opportunity to consult with a lawyer. Requiring a driver to immediately provide a breath sample, therefore, violates s. 10(b) of the *Charter*. The suspension of a driver's rights under s. 10(b) is justified, however, because the detention is very short. If the length of detention grows, the violation of the driver's s. 10(b) rights become more significant and can no longer be justified (*R v Breault*, 2023 SCC 9 ("*Breault*") at para. 34).

[31] It follows that the immediacy requirement will not be met if the detention was long enough that the driver could have consulted counsel. At the same time, there will be

circumstances in which the immediacy requirement is not met even when the length of the detention did not permit the driver to consult counsel (*Breault* at para. 51).

[32] There are circumstances in which the police may delay administering the ASD, however, those situations will be unusual (*Breault* at paras. 57-8). The time necessary to ready the equipment and instruct the driver about what to do is not considered delay (at paras. 29, 32).

[33] A breath demand made pursuant to s. 320.27(1) involves several *Charter* rights. In the case at bar, however, the right most implicated is s. 10(a). Section 10(a) requires the police to inform the individual that they are detained and the reasons for the detention. Timing is also an important element of s. 10(a). The police are required to fulfill their s. 10(a) obligations “promptly”. “Promptly” has been interpreted as being synonymous with “immediately” (*R v Kelly* (1985), 17 CCC (3d) 419 at 424).

[34] The purpose of s. 10(a) is to inform the individual why they are being detained, as an individual should not be “obliged to submit to an arrest if [they do] not know the reasons for it” (*R v Evans*, [1991] 1 SCR 869 at 886-7). It also informs the individual of their legal jeopardy so they can meaningfully exercise their right to consult a lawyer (*Evans* at 887).

Application of Legal Principles to the Case at Bar

[35] Counsel for the Crown submits that the trial judge erred when he found that Constable Fox did not make the demand immediately. He argues that “immediate” does not mean instantaneous. The delay here was an insignificant or trivial limitation on Mr. Schmidt’s rights. The *Charter* does not protect against such slight breaches (*R v*

KRJ, 2016 SCC 31 at para. 42). Mr. Schmidt's counsel submits that the trial judge properly applied the immediacy requirement.

[36] I conclude that Constable Fox's demand was made promptly and was therefore compliant with s. 10(a) of the *Charter*.

[37] I disagree with the trial judge's conclusion that reasonable suspicion arose when Constable Cook asked Mr. Schmidt how much he had to drink. In my opinion, Constable Fox developed reasonable suspicion only when he himself asked Mr. Schmidt how much he had to drink.

[38] Constable Fox testified that he asked Mr. Schmidt how much he had to drink because he did not believe that he could rely on what Constable Cook asked and he overheard. He testified that after he asked the question, and heard the response, he had reasonable suspicion. The trial judge reasoned, however, that when Constable Fox asked about Mr. Schmidt's alcohol consumption, he got no more information than when Constable Cook asked the question. Thus, the grounds for reasonable suspicion existed as soon as Mr. Schmidt answered the question the first time, in answer to Constable Cook. The trial judge concluded on that basis that reasonable suspicion existed at the moment Mr. Schmidt answered Constable Cook.

[39] I agree with the trial judge that when Constable Cook asked about Mr. Schmidt's alcohol consumption and Mr. Schmidt answered, the objective component of reasonable suspicion was made out. However, as noted above, reasonable suspicion is composed of both an objective and a subjective component. Here, Constable Fox believed that he could not form a reasonable suspicion until he himself asked Mr. Schmidt about his alcohol consumption. He was not correct in this belief. He could

have relied on what he overheard. However, the subjective component does not concern itself with the accuracy of the police officer's belief; it concerns itself with the honesty of the belief (*R v Tim*, 2020 ABCA 469 at para. 60 (minority, but not on this issue)). Thus, the subjective component of reasonable suspicion was only satisfied once Constable Fox took steps he believed were required of him to have reasonable suspicion.

[40] It should be noted that the trial judge's analysis was about whether Constable Fox had reasonable suspicion and should have made the ASD demand. While Constable Cook was involved in the investigation, there was no suggestion that he should have provided the demand. Constable Fox was the lead investigator and the one who administered the ASD. The trial judge's implicit decision, and one with which I agree, was Constable Fox was responsible for ensuring there was reasonable suspicion and in taking the next steps in the investigation. The reasonable suspicion threshold was therefore met when Mr. Schmidt told Constable Fox that he had three drinks, four hours before.

[41] Returning to the facts, after Mr. Schmidt answered Constable Fox, Constable Fox went to his car, got the ASD, returned, and administered it. The trial judge did not determine whether Constable Fox made the demand before he went to get the ASD or upon his return to the truck with the ASD in hand. I will assume for the purposes of the appeal that Constable Fox made the demand when he returned to the truck with the ASD. Constable Fox thus made the demand about 36 seconds after forming reasonable suspicion. This very short time, it seems to me, does not constitute delay in any real sense.

[42] Moreover, on the facts of this case, it is somewhat artificial to examine the demand for a breath sample separately from the administration of the ASD. The same requirements apply to the demand and administration of the ASD: both need to be done immediately. Here, the judge did not find that the police delayed in administering the ASD. Thus, Constable Fox administered the ASD immediately. It follows that the demand, which preceded the administration of the ASD, also occurred immediately.

[43] In my opinion, as well, there is a danger in basing the determination of delay on a calculation of seconds. The police should work expeditiously, but they should also have the time to consider different factors and potential issues when proceeding through a drinking and driving investigation. In the case at bar the investigation was not complex. Nevertheless, the police should not feel that they are racing the clock to fulfill the requirements of s. 320.27(1) of the *Criminal Code*.

[44] What is required of the police is that they act diligently, without being unnecessarily diverted from their task, and with the necessary equipment at hand. Here the police were focused on the investigation. Their actions were directed at determining whether they had grounds for seeking a breath sample, and then obtaining it. Mr. Schmidt was informed of the reasons for his detention and only after that was he required to provide the breath sample. The 36 seconds it took to make the demand and inform him of the reasons for his detention do not render the administration of the ASD unlawful.

[45] I therefore conclude that the police complied with s. 10(a) in making the demand for the breath sample.

Conclusion

[46] The Crown's appeal is allowed, the evidence is admitted, and a new trial is ordered.

WENCKEBACH J.