Citation: *R*. v. *Minielly*, 2009 YKTC 9

Date: 20090203
Docket: 08-00106
Registry: Whitehorse

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

Regina

v.

Robert William Minielly

Appearances:
Eric Marcoux — Counsel for Crown
Anthony Robinson — Counsel for Defence

REASONS FOR JUDGMENT

Overview

[1] Robert Minielly is charged with impaired driving and refusing to provide a breath sample into a roadside screening device pursuant to a s. 254(2) demand made to him by Cst. Ben Douglas, thus committing offences contrary to ss. 253(a) and 254(5) of the *Criminal Code of Canada*.

[2] On March 22, 2008, at 2:15 a.m., Cst. Douglas observed a vehicle being driven by Mr. Minielly stopped facing northbound in a driving lane on Second Avenue in Whitehorse. Cst. Douglas activated the police cruiser's lights and performed a u-turn. Mr. Minielly abruptly pulled his vehicle over to the shoulder of Second Avenue before driving to the next right-hand turn-off location a few hundred feet away.

[3] As a result of observations made by Cst. Douglas, he formed the opinion that he had reasonable and probable grounds to believe Mr. Minielly's ability to

operate a motor vehicle was impaired by Mr. Minielly's consumption of alcohol. Cst. Douglas then made a demand that Mr. Minielly provide a sample of his breath into a roadside screening device. Mr. Minielly stated that he did not understand and he was not going to do anything until he spoke to a lawyer. Cst. Douglas advised him that he would be given the opportunity to speak to legal counsel if the roadside screening device registered a fail.

[4] While Cst. Douglas was continuing to explain the roadside demand to Mr. Minielly, Cpl. Harrison arrived on the scene. Cpl. Harrison explained the roadside screening device demand to Mr. Minielly, the consequences of a "pass", "warn", or "fail" reading, and requested that he provide a breath sample into the roadside screening device. Mr. Minielly stated that he did not understand and said that he wanted to speak to a lawyer. Cpl. Harrison explained to Mr. Minielly the consequences of refusing to comply with the roadside screening device demand. He turned around, put his hands behind his back, and said "arrest me". Cpl. Harrison advised Mr. Minielly again of the demand that he provide a breath sample. Mr. Minielly said "No", and stated for a second time, "arrest me". Cst. Douglas then arrested him for impaired driving and refusing to provide a sample into a roadside screening device upon demand.

Issues

[5] There are three issues to be decided in this case:

1. Was the demand by Cst. Douglas for Mr. Minielly to provide a breath sample into the roadside screening device a valid demand, as Cst. Douglas had formed the opinion that he had reasonable and probable grounds to believe Mr. Minielly's ability to operate a motor vehicle was impaired by alcohol, prior to making the roadside screening device demand?

(Crown counsel agrees that the subsequent request and/or demand by Cpl. Harrison was not a valid demand as she had not spoken to Cst. Douglas to learn what his grounds for making the initial demand were, nor did she testify as to having made independent observations to justify making the demand. In addition, the wording in the s. 254(5) charge alleges a refusal of the demand made by Cst. Douglas).

2. Was Mr. Minielly's refusal to provide a sample into the roadside screening device a clear and unequivocal refusal?

3. Was Mr. Minielly's ability to operate a motor vehicle impaired by his consumption of alcohol?

Analysis

Issue #1: Was the s. 254(2) demand made by Cst. Douglas a valid demand?

Legislation

[6] Section 254(2), as it was on March 22, 2008, read, in part, as follows:

> (2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle…or who has the care and control of a motor vehicle…whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

[7] Section 254(3), as it was on March 22, 2008, read, in part, as follows:

> (3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the previous three hours

> has committed, as a result of the consumption of alcohol, an offence under s. 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable
>
> > (a) such samples of the person's breath as in the opinion of a qualified technician….
>
> are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

[8] Section 254(5), as it was on March 22, 2008, read as follows:

> (5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under this section.

Position of the Parties

Defence

[9] Counsel for Mr. Minielly submits that once Cst. Douglas formed the grounds to believe that Mr. Minielly's ability to operate a motor vehicle was impaired by his consumption of alcohol, Cst. Douglas could not make the s. 254(2) demand that Mr. Minielly provide samples into the roadside screening device. While an individual's constitutional right to consult legal counsel upon detention is lawfully suspended to allow for the obtaining of a breath sample into a roadside screening device, this suspension of rights is for the limited purpose of elevating a police officer's suspicion that the operator of the motor vehicle has alcohol in their body, to that of having reasonable and probable grounds to believe that an offence contrary to s. 253 has been committed.

[10] Once a police officer has reasonable and probable grounds to believe a s. 253 offence has been committed, there is no longer any legal authority to make the s. 254(2) roadside screening device demand, and the police officer can only

make the s. 254(3) breath demand. As such, the s. 254(2) demand by Cst. Douglas was not a lawful demand and therefore there was no refusal by Mr. Minielly in contravention of s. 254(5).

[11] Defence counsel is not alleging a breach of Mr. Minielly's *Charter* rights, as there is no evidence obtained as a result of a *Charter* breach which he wishes to have excluded under s. 24(2), but has framed his argument on the basis of the unlawfulness of the demand.

Crown

[12] Crown counsel submits that the use of the roadside screening device is not precluded simply because a police officer forms the opinion that he has reasonable and probable grounds to believe that a s. 253 offence has been committed. The roadside screening device is merely an additional investigative tool to supplement the police officer's other observations of an individual under investigation for a s. 253 offence. The evidence obtained through use of the roadside screening device is to be used only for the purpose of providing grounds for the s. 254(3) demand and, as such, is not evidence conscripted from Mr. Minielly that can be used against him in trial as proof of the commission of any offences with which he was or could have been charged. Any right to counsel which Mr. Minielly may have had as a result of his detention did not arise until he was arrested.

[13] Alternatively, Crown counsel submits that, notwithstanding Cst. Douglas' testimony that he had reasonable and probable grounds to believe that Mr. Minielly had committed a s. 253 offence, the court can examine whether these grounds in fact existed from an objective standpoint. In the event that the court determines on an objective review of the grounds that reasonable and probable grounds did not exist, and that Cst. Douglas only had an overall suspicion of impaired driving, the use of the roadside screening device was authorized in law.

Law

[14] The law is clear that obtaining conscripted evidence from an individual through the use of an approved roadside screening device, without providing a right to contact counsel, is a breach of the individual's section 10(b) *Charter* rights, and is justified only to the extent that the detention is minimally intrusive and necessary. This justification is found in: (a) the relatively brief delay in administering the roadside screening device, (b) the hindrance to the minimally intrusive nature of the delay if individuals under investigation for impaired driving were required to be provided their right to counsel, and (c) the limited use to which the evidence obtained from the roadside screening device can be put as the results only go to the grounds to make a further demand for breath samples under s. 254(3).

> The important role played by roadside breath testing is not only to increase the detection of impaired driving, but to increase the perceived risk of its detection, which is essential to its effective deterrence. In my opinion the importance of this role makes the necessary limitation on the right to retain and instruct counsel at the roadside testing stage a reasonable one that is justified in a free and democratic society, having regard to the fact that the right to counsel will be available, if necessary, at the more serious breathalyzer stage. (***R***. v. ***Thomsen***, [1988] 1 S.C.R. 640, at para. 22; see also ***R***. v. ***Bernshaw***, [1995] 1 S.C.R. 254, at paras. 26, 63; ***R***. v. ***Orbanski***; ***R***. v. ***Elias***, 2005 SCC 37, at para. 52).

[15] In sections 254(2) and 254(3) of the *Criminal Code*, Parliament has enacted a two-stage process to provide a means of testing for driver impairment, designed to "be both helpful to the police and convenient to the driving public". (***Bernshaw***, para 23). The first stage, involving the s. 245(2) demand, provides a means of screening drivers through a preliminary investigation aimed at determining whether a driver may constitute a danger to the public because of alcohol in the driver's system. The second stage, the s. 254(3) demand, is aimed at determining precisely the level of alcohol in a driver's body.

[16] The roadside screening device has been authorized for use as an investigative tool during the first stage of this process. It can be administered quickly, without causing the inconvenience to a driver that being required to accompany a police officer to the police station to provide a breathalyzer sample would cause. A driver who fails the roadside screening device test is not subject to criminal liability as a result, but the "fail" may lead to the driver being arrested and taking the breathalyzer test, which can result in criminal charges being laid against the driver. (***Bernshaw***, paras. 20-23, 49; ***R***. v. ***Einarson*** (2004), 184 O.A.C. 176, at paras. 11-13)

[17] The Supreme Court has recently considered the balance to be struck between the duty placed on police officers to investigate impaired driving offences, and the right of individuals to be free from state intrusion. In ***Orbanski;Elias***, the validity of roadside screening measures was at issue. Mr. Orbanski was asked to perform voluntary sobriety tests, the results of which allowed the police officer to form the reasonable and probable grounds to believe that an impaired driving offence had been committed. Mr. Elias was the subject of a random roadside stop, was asked whether he had been drinking alcohol, and provided a breath sample that registered a "fail" on the roadside screening device. Both Orbanski and Elias ultimately provided breath samples pursuant to a s. 254(3) demand and were charged with driving over .08 under s. 253(b) of the *Code*. Crown counsel conceded that neither Orbanski nor Elias were fully informed of their right to counsel until after they were arrested.

[18] The Supreme Court considered the rationale behind the need to effectively screen drivers detained for an impaired driving investigation, and in the majority decision, Charron J. stated that:

> [25] …the effective regulation and control of this activity [use of vehicles on highways] give rise to a unique challenge when it comes to protecting users of the highway from the menace posed by drinking and driving.

> ….the line between the permissible and the impermissible is not always easy to discern, and the necessary screening can only be achieved through "field" enforcement by police officers. It follows that these officers must be equipped to conduct this screening, though with minimal intrusion on the individual driver's *Charter* rights…
>
> [26] … The aim is to screen drivers at the road stop, not at the scene of the accident. Hence, effective screening at the roadside is necessary to ensure the safety of the drivers themselves, their passengers, and other users of the highway. Effective screening should also be achieved with minimal inconvenience to the legitimate users of the highway".
>
> …
>
> [45] The police power to check for sobriety, as any other power, is not without its limits; it is circumscribed, in the words of the majority of this court in *Dedman* by that which is necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.
>
> …
>
> [50] …In this case the request made to Orbanski fell within the scope of reasonable and necessary measures…The trial judge specifically held that these tests were reasonable and necessary:
>
> > In my view the interference with liberty in this case was necessary for the carrying out of the police duties described above. The police constable suspected that the appellant had been driving while his ability to drive was impaired by alcohol. However, he did not think that he had reasonable and probable grounds to demand that the appellant take a breathalyzer test. He requested the sobriety tests in order to see whether his suspicions were well founded – whether he could obtain reasonable and probable grounds for a demand for a breathalyzer test.

[19] The Supreme Court in ***Orbanski; Elias***, at paras. 55-58, considered the s. 1 *Charter* justification for the limit on the right to counsel as originally established in ***R.*** v. ***Oakes***, [1986] 1 S.C.R. 103:

(1) the objective of the law must be sufficiently important;
(2) there must be a rational connection between the limit and the objective;

(3) the infringement of the right must be no more than is necessary to meet the objective; and
(4) there must be proportionality between the deleterious and the salutary effects of the measure that limits the right or freedom protected by the *Charter*.

[20] Charron J., held that the important objective of "reducing the carnage caused by impaired driving" made it necessary for police officers to be empowered to screen drivers through the use of reasonable and effective roadside screening methods which themselves were limited to what was necessary to achieve the purpose of screening drivers. Finally, the proportionality criteria is met because the "…evidence obtained as a result of the driver's participation without the right to counsel can only be used as an investigative tool to confirm or reject the officer's suspicion that the driver might be impaired. It cannot be used as direct evidence to incriminate the driver".

[21] Simply put, these cases all clearly establish that the suspension of the s. 10(b) right of a driver, in order to allow a police officer to confirm the accuracy of his or her suspicion that the driver is operating, or has care and control of, a motor vehicle with alcohol in his or her system, constitutes a reasonable and justifiable limit in Canadian society.

[22] The question to be resolved in the case before me is where the line should be drawn on the limitation of the s. 10(b) *Charter* right of the individual upon detention for an impaired driving investigation. Given that it is justifiably limited when the police are pursuing the investigation of a suspicion, does the justification remain to allow a police officer to further his investigation through the s. 254(2) demand, once he has formed sufficient grounds to make an arrest?

<u>Post-arrest demand</u>

[23] It is clear, I believe, that once a police officer has arrested an individual for impaired driving there is no longer any legal authority to make a s. 254(2)

demand for a breath sample into a roadside screening device. (***R***. v. ***Jaber***, 2005 ONCJ 206, paras. 56 – 58; ***R***. v. ***Akot***, [2001] A.J. No. 1768 (Q.B.) at para. 207).

[24] The rationale accepted by the courts is that the s. 1 *Charter* limitation on the s. 10(b) right to counsel is only applicable when s. 254(2) operates within its legislative purpose. In ***R***. v. ***Diruggiero*** (1998), 52 C.R.R. (2d) 132 (B.C.S.C.), referring to ***R***. v. ***Bennett***, [1997] B.C.J. No. 432 (S.C.), the court stated at para. 17:

> A purposive approach to s. 254(2) revealed that activity outside its legislative ambit would also be outside the factors which ensure that the section is a justifiable limit on the s. 10(b) right under s. 1.

[25] In ***Diruggiero***, the police officer had arrested Mr. Diruggiero for impaired driving. The officer then made a s. 254(2) demand. The officer explained that he made the roadside screening demand for two reasons: the first was that he knew the demand would likely be refused and he could then charge Mr. Diruggiero for refusal, rather than expending the time required to take Mr. Diruggiero to the police station for a breathalyzer sample, and, the second reason, (apparently, as it was not clear on the evidence), was to determine whether there was another substance which may have contributed to Mr. Diruggiero's impairment. The court found that neither of these reasons were within the legislative purpose of s. 254(2). The court stated that:

> [20] The officer's first reason for making the demand at the scene, i.e because he knew it would be refused and he could then charge the appellant with refusal rather than waiting hours at the police station to do so, is not, in these circumstances, within the purpose of s. 254(2) and the justification for excluding s. 10(b) rights on an ASD demand. One reason for the ASD is to give the police a way to establish reasonable and probable grounds for a charge of impaired driving. Here the officer had those grounds already and had made an arrest on that charge. Another reason for s. 254(2) is to get drunk drivers off the road. This too had already been done since the accused was under arrest.
>
> …

> [22] I conclude that the purpose of making the ASD demand in this case was not within the legislative purpose of the section. The appellant, as he was detained, was therefore entitled to be informed of his right to counsel before he was required to submit to the ASD demand.
>
> [23] If I am wrong and it can be inferred that Con. Bezanson's reason for making the ASD demand was to screen for other causes of impairment…I would nevertheless hold that the appellant was entitled to access to counsel. One of the reasons for the appellant's arrest was the smell of alcohol. If there was a need to screen for other drugs this could only have been done in pursuit of the investigation of the impaired driving arrest. To use the ASD as an investigatory tool to determine the strength of another offence is not within the legislative ambit of s. 254(2) so that the appellant being detained, has to be told of his s. 10(b) rights. It is impermissible to extract incriminating evidence until an accused (who is entitled to do so) has had an opportunity to contact counsel. (referring to ***R***. v. ***Manninen*** (1987) 34 C.C.C. (3d) 385 (S.C.C.)).

[26] I concur with the reasoning in ***Jaber*** and ***Diruggiero*** as it relates to the lack of lawful authority for a police officer to make a s. 254(2) demand after the police officer has already arrested the accused for an impaired driving offence. The arrest triggers the s. 254(3) demand and the right to counsel. There no longer exists any reason or authority in law for the roadside screening device demand. (See also ***R***. v. ***Mitchell***, 2005 ONCJ 133 and ***R***. v. ***Ashton*** 2004 ONCJ 187 at para. 20-22, 31[1]).

[27] I have also considered the cases of ***R***. v. ***Lloyd*** (1997), 196 A.R. 226 (C.A.); leave denied, [1997] S.C.C.A. No. 187, and ***R***. v. ***Good***, 2007 ABQB 696, and find that they do not stand for a contrary proposition. In ***Lloyd***, a police officer arrested the accused and then made a s. 254(2) demand. The police officer testified that the arrest was only due to the police officer's belief that,

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[1] *Ashton* was disagreed with in ***R.*** v. ***Bourdeau*** 2005 ONCJ 92 at para. 15, although I do not read ***Ashton*** as the trial judge in ***Bourdeau*** did. To the extent that an initial arrest is not for an impaired driving offence and the police officer subsequently suspects that an impaired driving offence may have been committed and makes a lawful s. 254(2) demand, ***Ashton*** does not disagree. In ***Ashton*** the court found that the arrest was for both leaving the scene of an accident and for impaired driving, and the court stated that "…an arrest presupposes reasonable and probable grounds to believe an offense has been committed and entitles an officer to issue a formal breath demand" (para. 32)).

absent the arrest, the accused may flee. The police officer testified that he had a suspicion only of impaired driving at the time of the arrest. The court found that the "arrest" was more of a detention than an arrest and concluded that there was lawful authority for the s. 254(2) demand.

[28] In ***Good***, the court held that an arrest for other unrelated offences does not prevent a police officer from making a s. 254(2) demand once the police officer has a suspicion that the driver of a motor vehicle may have alcohol in their system, when the suspicion arose after the arrest on the outstanding warrants had been made and the right to counsel given.

Demand made pre-arrest but after grounds to arrest are formed.

[29] The more difficult question that arises in the case before me is whether the triggering moment at which there is no longer any lawful authority for the s. 254(2) demand is at the moment of arrest, or is at the moment a detained individual is arrestable due to the police officer's having concluded that he or she has reasonable and probable grounds to believe that a s. 253 offence has been committed.

[30] It would appear that if the lawful authority for the demand is solely for the purpose of elevating a police officer's suspicion to reasonable and probable grounds, then, once a police officer concludes that he or she has the reasonable and probable grounds to believe a s. 253 offence has been committed, the suspicion threshold has been passed and the s. 254(2) demand cannot be made, regardless of whether the individual has been arrested or not.

[31] ***R***. v. ***Carty***, 1998 ABQB 2 is one authority which stands for the above proposition. In a summary conviction appeal judgment, the court, in a one page decision, confirmed the trial judge's ruling that a police officer no longer had the

authority to make a s. 254(2) demand, having already formed his reasonable and probable grounds to believe that a s. 253 offence had been committed:

> [3] In this case the trial judge found as a fact that the investigating Constable was not using the screening device as a means of screening this accused. The officer had already concluded that the accused was driving while impaired. I agree with defence counsel that the Constable was using the screening device as a means of eliciting self-incriminating evidence from someone whom he believed had committed a criminal offence. Those actions do not fall within the ambit of s. 254(2). The provision cannot be used to justify a failure to comply with the Charter. This is all based on a finding of fact that the officer's actions in carrying out the screening test were not merely investigatory.

[32] There is no trial court judgment *per se* in ***Carty***, although I have reviewed a copy of the transcript of the trial proceedings in which the trial judge concluded that the s. 254(2) demand was invalid. (***R***. v. ***Carty***, Proceedings taken at Trial, in the Provincial Court of Alberta, Law Courts Building, Edmonton, Alberta, 12th June 1997, The Honourable Judge Dubé, as appended to these Reasons for Judgment).

[33] At trial, in cross-examination the police officer was questioned as follows:

> Q. Constable, why did you not read the accused his right to counsel once you formed the opinion that his ability to operate a motor vehicle was impaired by alcohol?
>
> A. Well, sir, I was thinking mainly about points of law and what is required and in any case when I am trying to be doubley sure, I'll get him to blow on that breathalyzer [referring to the Alco-Sur] and then there will be no question. (p. 22).

[34] In re-direct, Crown counsel attempted to open the issue of the police officer having had a suspicion rather than having formed reasonable and probable grounds to believe a s. 253 offence had been committed, but the trial judge made it clear that he found as a fact that the grounds to arrest were formed prior to the s. 254(2) demand being made (see pp. 40 – 41).

[35] After hearing submissions, the trial judge simply concluded that “I am satisfied for the reasons advanced by the defence[,] and the document entitled Certificate of Analysis ought not to be admitted as evidence in these proceedings…” (p. 48).

[36] The submissions of defence counsel on the s. 10(b) *Charter* application are found at pp. 34-38. In brief, the relevant submissions are as follows:

> a) as the police officer had already formed reasonable and probable grounds to believe a s. 253 offence had been committed, the s. 254(2) demand was not made for a screening purpose, but for the purpose of gathering further evidence for a s. 254(3) demand;
>
> b) once the police officer formed his opinion, Mr. Carty should have been given opportunity to exercise his right to counsel. The s. 254(2) demand was outside of the restrictions that are placed on police officers with respect to gathering evidence, once the opinion an offence has been committed are formed.

[37] ***Carty*** has been considered to stand for the proposition that a police officer must be acting within the scope of s. 254(2) in order to be within the s. 1 limit on an individual’s right to counsel. (see ***R***. v. ***Nagy***, 2003 ABQB 690 at para. 53).

[38] ***Carty*** has been further considered in the case of ***R***. v. ***Saxberg***, [1998] O.J. No 898 (Ct. Jus. Gen. Div.), which was also a summary conviction appeal. The facts in ***Saxberg*** are that the first police officer, Cst. Gardiner, concluded that he had reasonable and probable grounds to believe that Mr. Saxberg had committed the offence of impaired driving, based upon the fact of an accident, Mr. Saxberg’s bloodshot eyes and the smell of alcohol on his breath. Cst. Gardiner did not immediately arrest Mr. Saxberg, pending the arrival of a roadside screening device so that he could make the s. 254(2) demand. Mr.

Saxberg registered a “fail” on the roadside screening device and was arrested for impaired driving and informed of his right to counsel. Defence counsel argued that the 16 minute delay between the reasonable and probable grounds being formed by Cst. Gardiner and the administering of the roadside screening device constituted an unlawful detention, as Mr. Saxberg was not provided his s. 10(b) *Charter* right to counsel.

[39] The trial judge found that Cst. Gardiner did not, when viewed objectively, have reasonable and probable grounds to arrest Mr. Saxberg when he did and, in fact, only had a suspicion that Mr. Saxberg had committed the offence of impaired driving. Therefore the right to counsel was not triggered. The trial judge found that Cst. Gardiner was confused as to the distinction between the requisite “reasonable suspicion” for a s. 254(2) demand and “reasonable and probable grounds” for a s. 254(3) demand.

[40] The summary conviction appeal judge, in discussing the legislative scheme authorizing the s. 254(2) and s. 254(3) breath demands, stated:

> Once the investigation passes the point of reasonable suspicion, to the belief that reasonable and probable grounds exist, then a detention in which the driver not being informed as to his Charter s. 10(b) rights, is an infringement that cannot be saved by Section 1 of the Charter. (para. 18).

[41] The court considered the application of ***Carty*** and distinguished it on the facts, noting the trial judge’s finding that Cst. Gardiner was not using the roadside screening device for the purpose of eliciting self-incriminating evidence, as was the case in ***Carty***, but for a merely investigatory purpose. The court was not prepared to interfere with the trial judge’s finding that Cst. Gardiner only had a reasonable suspicion, and not reasonable and probable grounds, when he made the s. 254(2) demand, notwithstanding that the reviewing court may have come to a different conclusion than the trial judge.

[42] I note that in ***Carty*** it appeared that what constituted "self-incriminating evidence" was what defence counsel at trial stated in submissions was the gathering of further evidence for a s. 254(3) demand because the officer had already formed the grounds to arrest (Trial Transcript, p. 35). Given the limits applicable to the use of evidence resulting from a s. 254(2) demand, the wording "self-incriminating evidence" is perhaps somewhat confusing phrasing. There is no question that a "fail" result on a roadside screening device increases the probability of a court finding that a police officer had reasonable and probable grounds to believe that a s. 253 offence had been committed, thus justifying a s. 254(3) demand. In that regard, the results from a roadside screening device test may ultimately contribute to a finding by a court that breath samples resulting from a s. 254(3) demand are admissible at trial, and to that extent they could perhaps be viewed as constituting "self-incriminating evidence".

[43] The above cases stand for the proposition that once a police officer has formed his or her reasonable grounds to believe that a driver has committed a s. 253 offence, there is no longer any need to screen the driver in order to determine whether the s. 254(3) demand can be made and the driver be required to provide breath samples into a breathalyzer, with the results of these breath samples being admissible as evidence against the driver. To repeat my paraphrasing of Charron J. in ***Orbanski*****;** ***Elias*** as set out earlier in these reasons:

> The important objective of "reducing the carnage caused by impaired driving" made it necessary for police officers to be empowered to screen drivers through the use of reasonable and effective roadside screening methods which themselves were limited to what was necessary to achieve the purpose of screening drivers.

[44] Therefore the s. 1 limit on the s. 10(b) right to counsel is no longer applicable as the screening test is no longer necessary to achieve the screening objective, as the driver is already arrestable and can be tested to determine the exact concentration of alcohol in his or her blood.

[45] Crown counsel here relies on the comments of Cory J. in ***Bernshaw*** at paras. 37-38 to counter the reasoning set out in ***Carty*** and other cases.

[46] ***Bernshaw*** was a case primarily dealing with the issue of delay in administering the roadside screening device because of the presence, or potential presence, of residual mouth alcohol in Mr. Bernshaw's mouth. During trial, the police officer testified that he had a suspicion only that Mr. Bernshaw was impaired. Based upon the "fail" result on the roadside screening device, the police officer then concluded that he had reasonable and probable grounds to believe that Mr. Bernshaw's ability to operate a motor vehicle was impaired by alcohol.

[47] Justice Cory, writing for a minority of the Court, was of the opinion that the police officer likely had the requisite reasonable and probable grounds without the "fail" reading on the roadside screening device. Justice Cory stated that, "The constable, in a commendable manner, wished to have his observations and suspicions confirmed by the ALERT test. It was not unreasonable for him to take this position" (para. 38).

[48] Crown counsel argues that it is similarly commendable for Cst. Douglas to have used the roadside screening device in this case, notwithstanding his belief that he already had reasonable and probable grounds to believe that Mr. Minielly's ability to operate a motor vehicle was impaired because of his consumption of alcohol. The roadside screening device was present, the further delay required would be brief, and its use minimally intrusive. In the event that the roadside screening device did not provide a "fail" reading, Mr. Minielly may well have been free to go.

[49] I consider, however, that Cory J.'s comments cannot be taken to be read as standing for the proposition that a police officer can make a s. 254(2) demand

after having formed reasonable and probable grounds to believe a s. 253 offence has been committed. He goes on to state in the same paragraph that:

> … Further, if an officer has a reasonable suspicion, based on observation or reliable information that the driver has alcohol in the body, and as a result requires an ALERT test to be taken, then a fail result, in and of itself, may be sufficient to raise the officer's suspicions to the reasonable and probable grounds required to make the breathalyzer demand.

[50] Defence counsel points to the annotation in the headnote to the case where it reads:

> While there were several other potential indicia of impairment in this case aside from the evidence provided by the screening test, the police officer apparently did not form a belief based upon reasonable and probable grounds until after administering the roadside screening test. **Assuming this to be the case**, he was entitled to rely on the "fail" result of the screening test… [emphasis mine]

[51] While recognizing that the headnote itself does not have any persuasive value, this annotation seems to be drawn from the decision of Sopinka J., writing for the majority of the Court, where, in concluding that the police officer only had a suspicion of alcohol in the driver's body when he made the s. 254(2) demand, stated:

> For the purposes of my reasons, I will assume that absent the "fail" result on the screening test, there would not have been reasonable and probable grounds to demand a breathalyzer.

[52] While the comments of Cory J. and Sopinka J. are not made in the context of assessing whether a s. 254(2) demand can be made after a police officer has formed the reasonable and probable grounds to believe a s. 253 offence has been committed, they do reinforce the point that the use of the roadside screening device is to either validate or negate a suspicion that a driver has alcohol in his or her body, and, as a result, may have committed a s. 253 offence.

[53] The case of ***R***. v. ***Smith***, 2003 YKTC 52, although standing for the proposition that a police officer is entitled to continue his or her investigation even after forming an opinion that an impaired driving offence has been committed, cannot be read as extending the investigative options so far as allowing for a s. 254(2) demand.

[54] In ***Smith***, defence counsel challenged the police officer's reasonable and probable grounds for making a s. 254(3) breath demand. The police officer, Cst. Turner, testified that he had formed the opinion that Mr. Smith's ability to operate a motor vehicle was impaired by alcohol. Prior to making the s. 254(3) breath demand, however, he requested that Mr. Smith "volunteer" to perform some roadside sobriety tests. Cst. Turner testified that he made this request of Mr. Smith in order to practice some of the procedures he had learned on a course earlier that year. He did not provide Mr. Smith the required *Charter* and police warning prior to conducting the test. Crown counsel did not attempt to enter the roadside sobriety tests as evidence at trial.

[55] In cross-examination, Cst. Turner denied defence counsel's assertion that he did not have reasonable and probable grounds prior to making the request for the sobriety tests. The trial judge accepted Cst. Turner's evidence and stated:

> A police officer is not obligated to terminate an investigation when a minimum threshold of evidence is collected. In a "break and enter" investigation, a police officer is not obligated to stop interviewing witnesses or suspects when he or she believes sufficient evidence to justify a conviction has been collected. A proper investigation would require all leads and reasonably available evidence to be collected. Similarly, in a drinking and driving investigation, an officer is not obligated to terminate the investigation once the lower threshold of evidence justifying a breath demand pursuant to s. 254(3) of the *Code* has been reached. Invariably, as in this case, the officer is also investigating another charge, that of impaired driving, and he or she is entitled to collect all relevant evidence in relation to it. So even when an officer forms the opinion that a driver's ability to operate a motor vehicle is impaired by alcohol or a drug, he is entitled to continue his investigation. This may include a request that the driver perform roadside sobriety tests. The

> results of such tests may be admissible provided they have been conducted properly, the appropriate advice and warnings have been given, and an expert witness is available to testify as to how the driver's performance on the sobriety tests relates to his ability to operate a motor vehicle (para. 21).

[56] To the extent that a police investigation may continue, the trial judge in ***Smith*** is speaking of a "request", not a "demand", and he stipulates that the appropriate advice and warnings be given to the driver. This contemplates a voluntary compliance with the request by the driver, on the basis of a fully informed consent, and after being informed of and provided the opportunity to contact counsel to obtain the necessary advice, should the driver wish to exercise that option.

[57] A breath sample can be obtained through the use of a roadside screening device if the driver volunteers to provide a sample (see ***R***. v. ***Woods***, 2005 SCC 42, para. 9). Allowing a driver to take the roadside screening test voluntarily does not undermine the police officer's pre-existing reasonable and probable grounds, although the results of the roadside screening device test may cause the police officer to revise his or her opinion and release the driver without impaired driving charges. The consent, however, would need to be fully informed, including information that a "fail" result could support a charge of impaired driving against the individual or, under the current legislation, result in a further investigation into a drug-related impairment. The driver would need to be provided an opportunity to contact counsel, if desired, in order to receive any advice as to whether he or she should in fact volunteer to provide a breath sample.

[58] Fundamentally, the problem with allowing a police officer to make a s. 254(2) demand after having formed the reasonable and probable grounds to believe an impaired driving offence has been committed, is the third part of the ***Oakes*** justification: (3) the infringement of the right, (here s. 10(b)), must be no more than is necessary to meet the objective.

[59] Once the police officer subjectively believes that he or she has these reasonable and probable grounds, how can it be said that the s. 254(2) demand is necessary? The results of a breath sample provided by such a demand may be supportive and confirmatory of the police officer's belief, but these results are not necessary as the individual is already arrestable and can be taken down to the breathalyzer for samples to be taken to confirm the precise amount of impairment.

[60] I fully appreciate that it may appear contrary to logic and public policy, that a police officer who has in his or her possession a roadside screening device that could provide objective scientific evidence as to whether there existed reasonable and probable grounds for the police officer's belief that a s. 253 offence had been committed, is not allowed to use the roadside screening device because of his or her having previously subjectively concluded that these reasonable and probable grounds existed.

[61] If a police officer in such a situation cannot make a roadside screening device demand, then a subsequent determination by the trial judge that, viewed objectively, the grounds are insufficient, would lead to an acquittal on a. s. 253(b), now 253(1)(b), charge. Subjective beliefs are exactly that, subjective, based upon the individual police officer and his or her individual experience and training, and, when at all possible, the subjective belief should logically be supplemented by the use of objective evidence such as the roadside screening device.

[62] Police officers often have to withstand intense cross-examination on their observations of bloodshot eyes, slurred speech, odour of liquor, flushed face and so on, all of which may comprise ticked boxes on a police Report to Crown Counsel, or brief notes in a notebook, and which may appear somewhat lifeless or as a rote recitation in court at trial, as compared to what the officer actually observed and experienced at the time. The ability to produce a "fail" result on the

roadside screening device in support of these other observations often has the effect of eliminating the need for police officers to testify as to their reasonable and probable grounds, and can often result in guilty pleas where otherwise a trial would take place.

[63] The problem, however, is that the two-stage scheme set up in s. 254(2) and (3) of the *Criminal Code*, as considered by the courts, does not allow for a police officer to make a s. 254(2) demand to confirm his or her reasonable and probable grounds of belief. Section 254(2) reads specifically that its allowable use is to screen a driver who the police officer suspects has alcohol in his or her body, and the courts have held that this s. 10(b) breach of the right to counsel is justifiable under s. 1 of the *Charter*, in part on the basis that this suspension of the s. 10(b) rights is necessary to allow police officers to investigate impaired driving offences.

[64] If s. 254(2) included wording to the effect that "…or wishes to confirm the belief in the existence of reasonable and probable grounds to believe a s. 253 offence has been committed", it may be that previous courts applying s. 1 of the *Charter* would have concluded that a s. 254(2) demand could be justified even after the reasonable and probable grounds have been formed, given the brief delay involved, the limited use to be made of the results of the roadside screening device, and the important objective of investigating impaired driving offences in order to remove impaired drivers from the roads and deter others from driving while impaired.

[65] This is not, however, the way that s. 254(2) reads or has been considered in law, and I am not prepared to find an implied authority in s. 254(2), or in the s. 1 analysis of previous courts, to allow a breath demand to be made after the police officer has formed the subjective reasonable and probable grounds to believe that a s. 253 offence has been committed. Therefore, I find that such a demand is unlawful and outside of the legislative scope and purpose of s. 254(2).

[66] This does not mean that a police officer who has formed a subjective belief that he or she has reasonable and probable grounds to believe that a s. 253 offence has been committed is bound by that belief. A police officer is entitled to change his or her opinion. An initial belief by a police officer that he or she possessed reasonable and probable grounds to believe that the driver of a motor vehicle was impaired by alcohol may be altered by additional information and reduced to a suspicion.

[67] This change of opinion can clearly occur pre-arrest and, in certain circumstances, it may be possible for a police officer to resile from his or her grounds post-arrest, although this would be more difficult as the individual, properly informed about his or her right to counsel, would likely, except in circumstances where the police officer can effectively almost immediately "un-arrest" the person, need to be provided the opportunity to contact counsel at this stage, notwithstanding the lack of such a right for a s. 254(2) demand not fettered by a pre-existing arrest.

[68] The police officer may make certain additional observations that either support or undermine the police officer's reasonable and probable grounds for belief that a driver has committed a s. 253 offence. The police officer may note for the first time, after having already formed reasonable and probable grounds to believe an impaired driving offence had been committed, that the road is slippery where the individual apparently had a balance problem, be advised of a reasonable and innocent explanation for the bloodshot eyes or flushed face and disorderly clothes, and so on. In such a case the police officer can reassess his or her belief and conclude that he or she only has a suspicion of alcohol impairment, and thus make the s. 254(2) demand.

[69] In ***R***. v. ***Jackson*** (1993), 147 A.R. 173 (Q.B.) a police officer, who had already formed the subjective belief that Mr. Jackson was operating a motor vehicle while impaired, changed her opinion after being advised that the vehicle

had a steering problem. After a second police officer confirmed that the steering problem existed, the initial police officer testified that she now only had a suspicion and she made the s. 254(2) demand. The court held that the momentary detention that occurred after the initial opinion of impairment was formed until being advised of the steering problem, did not have significant legal consequences which prevented or impeded access to counsel. It was proper for the police officer to revise her opinion and investigate further.

> Belief that a crime may have been committed neither compels arrest (or detention) nor operates as a bar to further investigation. Belief that a crime has been committed does not alone trigger s. 10(b) of the Charter (para. 14).

Application to the facts of this case

[70] Cst. Douglas had clearly formed his reasonable and probable grounds to believe that a s. 253 offence had been committed prior to giving the s. 254(2) demand. At trial he was questioned as follows:

> Direct examination
>
> Q. When you asked him for a driver's license, did you tell him why you asked him for his driver's license?
>
> A. At this point I believe I informed him that he was being detained for an impaired driving investigation.
>
> Q. And ummm so what was the name on the driver's license?
>
> A. The driver's license indicated the name of Robert William Minielly and provided a birthdate of October 7th 1965. At this time I was in close proximity with Mr. Minielly and was able to detect an odour of fresh liquor on his breath. At approximately 2:17 a.m. based on what I observed in his, in the driving patterns and the physical appearance of Mr. Minielly, I formed the opinion that his ability to operate a motor vehicle was impaired. I then proceeded to read the approved screening demand verbatim from a card I carry with me.

Cross-examination

> Q. You formed your grounds to believe that he, this individual was impaired by alcohol prior to giving the RSD demand?
>
> Y. Yes.

[71] Cst. Douglas also wrote in the sworn documentation for the 90-day suspension under the territorial motor vehicle legislation, and in his General Occurrence Report, that he formed his opinion of impairment at 2:17 a.m., prior to making the s. 254(2) demand.

[72] Cst. Douglas provided no reason for why he gave the s. 254(2) demand after having formed his reasonable and probable grounds. Crown counsel attempted to question him on this point in re-examination. Defence counsel objected on the basis that this was improper questioning in re-direct and I agreed.

[73] That said, it would not matter whether Cst. Douglas made the s. 254(2) demand in order to confirm his beliefs or whether he made the demand pursuant to any RCMP practice and policy. The only explanation that would matter is that he changed his mind before making the demand, such that he had a suspicion only of alcohol in the body of Mr. Minielly.

[74] I find nothing in the evidence or actions of Cst. Douglas that would support any such explanation. Cst. Douglas gave no evidence that he changed his opinion. I am not prepared to infer from Cst. Douglas' response to Mr. Minielly's request to speak to legal counsel: "I further explained to him in plain English that depending on the results of the reading that opportunity may be afforded to speak with counsel if the 'fail' reading registered", that this meant he had changed his mind to having a suspicion only.

[75] The same is true with respect to Cst. Douglas' testimony in cross-examination that "all these options were in play", referring to when Cpl. Harrison told Mr. Minielly that a "pass" or "warn" reading would allow him to be on his way (or receive a 24 hour suspension), and in the event of a "fail" reading he would be allowed to contact counsel.

[76] It is important to note that Mr. Minielly was arrested for impaired driving as well as refusing to provide a breath sample. If Cst. Douglas had changed his mind to having only a "suspicion", then there was no basis for charging Mr. Minielly with impaired driving.

[77] As such, the s. 254(2) demand was outside of its legislative purpose and was unlawful.

[78] The remaining argument advanced by Crown counsel is that the court can look behind Cst. Douglas' subjective belief in the existence of reasonable and probable grounds, and find that these grounds did not exist from an objective standpoint. Therefore, the court can find that Cst. Douglas had a suspicion only, thus making the s. 254(2) demand lawful. This is what occurred in ***Saxberg***.

[79] It is an interesting aspect of this case that Crown counsel finds himself in the position of arguing that the police officer did not have the requisite reasonable and probable grounds, and defence counsel is arguing that he did.

[80] Cst. Douglas' reasonable and probable grounds were based upon the following observations:

- driving pattern
- slouched forward in the driver's seat
- stated he was coming from a bar
- pale complexion
- eyes appeared glassy and bloodshot
- speech somewhat slurred (I note that this observation was at trial only and was not in the Report to Crown Counsel)

- he seemed rather arrogant
- he was confused with his lines of thinking
- some trouble getting his license from his wallet and dropping some of the cards, which Cst. Douglas picked up.
- moderate odour of liquor on breath

[81] Courts are routinely asked to look behind the subjective beliefs of police officers in their reasonable and probable grounds to believe a s. 253 offence had been committed, and to exclude from evidence breath samples taken pursuant to a s. 254(3) demand based upon those beliefs. I am not convinced that the reverse is true when considering a s. 254(2) demand. A police officer who believes he or she already has the requisite reasonable and probable grounds cannot be said to then be using the s. 254(2) demand for the investigatory purpose of screening a driver in order to see whether there is alcohol in the driver's body, regardless of whether at the end of the day these subjective grounds are objectively sustainable.

[82] Whether I am right or wrong on this point, however, I find that the observations of Cst. Douglas were sufficient to have allowed him to subjectively form his reasonable and probable grounds to believe that Mr. Minielly had committed a s. 253 offence. As such, I will not accede to Crown counsel's argument on this point.

[83] In conclusion, I find that the s. 254(2) demand was not authorized in law and Mr. Minielly is acquitted of the s. 254(5) charge.

[84] In the event that I am determined to be wrong in this conclusion, I will consider the remaining issues.

Issue #2: Was there a failure or unequivocal refusal by Mr. Minielly of the s. 254(2) demand made by Cst. Douglas?

[85] A refusal can be verbal or evidenced by the conduct of an individual. The totality of the circumstances must be viewed in assessing whether there was, in fact, a failure or a refusal to submit to a breath demand, and these circumstances must clearly disclose a failure or a refusal by the individual. A constructive refusal can be made out where a police officer has done all that he or she could reasonably be expected to do to get the individual to provide the breath sample on demand. (See ***R***. v. ***Bennett***, [1997] B.C.J. No. 432 (S.C.) at paras. 14–17; ***R***. v. ***Cunningham*** (1989), 49 C.C.C. (3d) 521 (Alta. C.A.) at p. 533).

[86] The act of refusing a s. 254(2) demand must be made consciously with an awareness of the fact that the individual is refusing to comply with a police demand. It does not require "…an additional superordinate criminal intent to break the law or refuse unlawfully". (***Nagy*** at para. 28).

[87] Cst. Douglas made the s. 254(2) demand verbatim from the card he carried. No issue has been raised as to the sufficiency of the demand. Cst. Douglas testified that his overall impression from his discussion with Mr. Minielly was that he was not going to provide a breath sample until he spoke with legal counsel. Cst. Douglas' initial interaction with Mr. Minielly was fairly brief before Cpl. Harrison arrived on the scene.

[88] While the intervention of Cpl. Harrison did not result in an additional lawful s. 254(2) demand with which Mr. Minielly could have been charged, it did result in further conduct by Mr. Minielly that can be considered when determining whether his refusal of Cst. Douglas' s. 254(2) demand was clear and unequivocal.

[89] I find that Mr. Minielly's conduct, when considering all of his interactions with Cst. Douglas and Cpl. Harrison, the information he received and the responses he gave, clearly establish that he was refusing to provide a breath sample pursuant to Cst. Douglas' s. 254(2) demand.

Issue #3: Was Mr. Minielly's ability to operate a motor vehicle impaired by the use of alcohol?

[90] Crown counsel has conceded that there is insufficient evidence to prove beyond a reasonable doubt that Mr. Minielly's ability to operate a motor vehicle was impaired by alcohol. This was a logical concession, given Crown counsel's argument that Cst. Douglas did not possess the requisite reasonable and probable grounds to arrest Mr. Minielly at the time he made the s. 254(2) demand.

[91] Nonetheless, I agree that the evidence falls short of meeting the necessary criteria to sustain an impaired driving conviction and therefore dismiss this charge as well.

Cozens T.C.J.