SUPREME COURT OF YUKON

Citation: *R. v. Smarch*, 2014 YKSC 27

Date: 20140609
S.C. No. 13-AP004
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

KRISTINE SMARCH

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

David McWhinnie — Counsel for the Respondent
Lauren A. Whyte — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal from a decision of a Territorial Court Deputy Judge who convicted the appellant, Kristine Smarch, of the offence of operating a motor vehicle while the concentration of alcohol in her blood exceeded 80 mgs per 100 mL, contrary to s. 253(1)(b) of the *Criminal Code*. The offence arose on December 1, 2012, and the conviction was entered on June 4, 2013.

[2] The appellant submits that the trial judge erred in finding that the investigating police officer, Constable Baceda: (1) had reasonable suspicion sufficient for the demand that she provide a breath sample into an approved screening device ("ASD"); and (2) made the demand "forthwith" after forming his reasonable suspicion. The appellant further submits that the unlawfulness of the ASD demand by Constable Baceda gave rise to breaches of her *Charter* rights under ss. 8 (unreasonable search and seizure), 9 (arbitrary detention) and 10(b) (right to counsel), and that this should result in exclusion of the subsequent breathalyzer results, under s. 24(2) of the *Charter*.

EVIDENCE

[3] Constable Baceda testified in a *voir dire* at the trial that he was on patrol on December 1, 2012, driving up Two Mile Hill, towards the Alaska Highway in Whitehorse. He observed a truck being driven without working rear lights. It was dark out. Constable Baceda testified that he observed the vehicle for approximately 1 km and, at 7:30 PM, he conducted a roadside stop by the Canada Games Centre. He said there was nothing about the manner in which the truck was driven, or the way it pulled over, which caused him any concern.

[4] Constable Baceda approached the truck and observed the appellant, who was the driver, having difficulties rolling down the driver's side window. He said the appellant advised him that she could not roll down her window all the way, so she had to open up her door. Constable Baceda also testified that the problem with the window could have been mechanical or due to the cold weather that night, as the temperature was close to -40°C.

[5] Constable Baceda also testified that the appellant had issues with trying to open the driver's door on the truck and "it took her a few times to open it up". In cross-examination, he conceded that the door sounded like it was locking and unlocking repeatedly, which would also suggest a possible mechanical or cold weather problem.

[6] After the appellant had opened the door, Constable Baceda observed two cans of Budweiser beer inside the truck on the center of the dashboard. He did not determine whether they were sealed or open. When he asked the appellant to produce her driver's licence, registration and insurance, she advised that she did not have her driver's licence with her as she had left it at the place where she purchased the beer. Constable Baceda testified that the appellant verbally identified herself as Kristine Smarch.

[7] Constable Baceda noted that there was a passenger in the truck who was passed out. He also acknowledged seeing sealed cans of beer in the back seat of the truck.

[8] Constable Baceda described the appellant's speech as "very slow" and "deliberate". He similarly described her motor skills as "very slow "and "deliberate" and added that she "seemed to be having issues" in that regard. On cross-examination, Constable Baceda said that the appellant's "reactions were sleepy-like". He also said that the appellant mentioned that she had woken up to provide the passenger a ride. Constable Baceda conceded that, if that were true, it was possible that she was still sleepy.

[9] When Constable Baceda asked the appellant if she had anything to drink that night, she mentioned that she had one beer at lunch. On cross-examination, he clarified that the appellant said this would have been either at noon or 1 PM. He did not obtain

any further clarification on the exact quantity of beer consumed. Although Constable Baceda obviously believed the appellant's admission that she consumed alcohol earlier in the day, he testified that he did not believe her statement that she only had one beer and that it had occurred around noon or 1 PM.

[10] On cross-examination, Constable Baceda testified that he did not observe any smell of alcohol. He also said that the appellant did not have bloodshot eyes. Constable Baceda conceded that the appellant was responsive to his questions, very polite, coherent, and was not slurring her words. When asked if the appellant had a flushed face, he replied somewhat ambiguously: "No. It's cold, everyone has a flushed face."

[11] Although Constable Baceda had never had any previous interaction with the appellant, when asked in cross-examination if he would agree that her speech was "not so slow as to be out of sort of the regular bounds of speech", he replied: "For me, at that time, it was."

[12] Constable Baceda testified that, following his initial dealings with the appellant at her vehicle, he decided to return to the police vehicle to run some radio checks to confirm whether she in fact had a valid driver's licence, to see whether she had any conditions on her driving or any demerit points, to confirm the validity of her vehicle registration, and to determine whether she had committed any prior related offences. In answer to questions from the trial judge, Constable Baceda said that while he was in the police vehicle, he began to reflect on the possibility of the appellant having consumed alcohol prior to driving. In particular, the following exchange occurred:

> "Q: Okay. <u>And when exactly did you form the reasonable suspicion</u> that she had alcohol in her body and she'd been operating a vehicle?

> A: I started thinking of it when I was back in the car. Seeing the car, like the motor skills, the passenger, the beer cans in the vehicle, no lights are on, so –
>
> Q: So –
>
> A: -- as I'm going through my checks that's kind of what I'm going through my mind what's going on. [as written]
>
> Q: So you're absorbing what you learned from being at her vehicle?
>
> A: Correct.
>
> Q: While you're back in your vehicle?
>
> A: Correct." (p. 19) (my emphasis)

[13] In cross-examination, Constable Baceda conceded that none of the information received in his police vehicle added to the reasons why he was suspicious that the appellant had been drinking alcohol. In particular, the following exchange occurred:

> "Q: Constable Baceda, you would agree with me that those checks could have been done after Ms. Smarch had a roadside screening device administered to her?
>
> A: I never do it that way.
>
> Q: But you agree those checks could still have been done after she'd had a roadside screening administered?
>
> A: Yes, they could have.
>
> Q: So you'd agree with me that you could have administered the ASD demand at an earlier point if you'd wanted to?
>
> A: Yes." (p. 16)

[14] At 7:36 PM, Constable Baceda returned to the appellant's vehicle and read her the ASD demand. She returned with him to the police vehicle and, at 7:40 PM, she provided a breath sample into the ASD, which registered as a fail result.

[15] Constable Baceda then immediately provided the appellant with her *Charter* right to counsel, the police warning and the breathalyzer demand. She was then taken to the RCMP detachment to provide the breathalyzer samples which gave rise to the charge for which she was convicted.

LAW

[16] Section 254(2)(b) of the *Criminal Code* provides as follows:

> "(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:
>
> …
>
> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose."

[17] The most recent leading case on the standard of reasonable suspicion is *R. v. Chehil*, 2013 SCC 49. In that case, the Supreme Court of Canada confirmed that a reasonable suspicion must be based on objectively ascertainable grounds which can be subjected to subsequent independent judicial scrutiny. The totality of the circumstances must be taken into account and considered in relation to one another. A reasonable suspicion need only give rise to the possibility of a crime having been committed, and not a probability. Further, the possibility of a crime having been committed need not be the only inference that can be drawn from the totality of the circumstances. Finally, while the police cannot ignore or disregard exculpatory, neutral or equivocal information, they do not have a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations.

[18] At paras. 26 - 29 and 31 – 34 of *Chehil*, the Court stated:

> "26 Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, Binnie J. provided the following definition of reasonable suspicion, at para. 75:
>
> > The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.
>
> 27 Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.
>
> 28 The fact that reasonable suspicion deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in crime ….
>
> 29 Reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience: see *R. v. Bramley*, 2009 SKCA 49, 324 Sask. R. 286, at para. 60. A police officer's grounds for reasonable suspicion cannot be assessed in isolation: see *Monney*, at para. 50.
>
> …

> 31 While some factors, such as travelling under a false name, or flight from the police, may give rise to reasonable suspicion on their own (*Kang-Brown*, at para. 87, per Binnie J.), other elements of a constellation will not support reasonable suspicion, except in combination with other factors. Generally, characteristics that apply broadly to innocent people are insufficient, as they are markers only of generalized suspicion. The same is true of factors that may "go both ways", such as an individual's making or failing to make eye contact. On their own, such factors cannot support reasonable suspicion; however, this does not preclude reasonable suspicion arising when the same factor is simply one part of a constellation of factors.
>
> 32 Further, reasonable suspicion need not be the only inference that can be drawn from a particular constellation of factors. Much as the seven stars that form the Big Dipper have also been interpreted as a bear, a saucepan, and a plough, factors that give rise to a reasonable suspicion may also support completely innocent explanations. This is acceptable, as the reasonable suspicion standard addresses the possibility of uncovering criminality, and not a probability of doing so.
>
> 33 Exculpatory, neutral, or equivocal information cannot be disregarded when assessing a constellation of factors. The totality of the circumstances, including favourable and unfavourable factors, must be weighed in the course of arriving at any conclusion regarding reasonable suspicion. As Doherty J.A. found in *R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 751, "[t]he officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable". This is self-evident.
>
> 34 However, the obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations…." (my emphasis)

[19] The law in the area of the "forthwith" requirement is relatively clear. Section 254(2)(b) of the *Criminal Code* technically only requires that the breath sample be provided "forthwith" following the ASD demand. The section is silent as to the time

permitted for the police officer to make that demand. However, the case law has evolved to interpret “forthwith” as creating an “immediacy requirement” which necessitates that the ASD demand be made promptly after a reasonable suspicion is formed, and that the response to the demand be provided as soon as reasonably possible. The need for immediacy recognizes that during a detention under s. 254(2), the suspect’s constitutional right to counsel and freedom from arbitrary detention are being temporarily suspended while the investigation proceeds. Two cases in particular are illustrative of the current state of the law.

[20] In *R. v. Quansah*, 2012 ONCA 123, the Ontario Court of Appeal explained the origin of the immediacy requirement, at paras. 25 and 26:

> “25 Section 254(2) does not explicitly require that the police officer's demand be made "forthwith"; rather, it only specifically requires that the motorist provide a breath sample "forthwith". However, Arbour J.A. in *R. v. Pierman; R. v. Dewald* (1994), 19 O.R. (3d) 704 (C.A.), at para. 5, held that "it is implicit that the demand must be made by the police officer as soon as he or she forms the reasonable suspicion that the driver has alcohol in his or her body." In that same paragraph she reasons that:
>
> > This is the only interpretation which is consistent with the judicial acceptance of an infringement on the right to counsel provided for in s. 10(b) of the Charter. If the police had discretion to wait before making the demand, the suspect would be detained and therefore entitled to consult a lawyer.
>
> 26 *Woods* [*R. v. Woods*, 2005 SCC 42] confirms this and reasserts that the constitutional validity of s. 254(2) depends on its implicit and explicit requirements of immediacy. This immediacy requirement is implicit for the police demand for a breath sample and explicit for the mandatory response: the driver must provide a breath sample “forthwith”. The term “forthwith” in s. 254(2), therefore, means “immediately” or "without delay" and indicates a prompt demand by the peace officer and an immediate response by the person to whom

> that demand is addressed: see Woods, at paras. 13-14 and 44. However, in unusual circumstances "forthwith" may be given a more flexible interpretation than its ordinary meaning strictly suggests: see Woods, at para. 43." (my emphasis)

[21] At paras. 45 - 49 of *Quansah*, the Court of Appeal summarized five things courts must consider in assessing whether the immediacy requirement has been satisfied. I paraphrase here:

1) The analysis of the forthwith or immediacy requirement must always be done contextually.

2) The demand must be made by the police officer "promptly", once he or she forms the reasonable suspicion that the driver has alcohol in his or her body.

3) "Forthwith" connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation of reasonable suspicion to the making of the demand to the detainee's response to the demand (by refusing or providing a sample) must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2).

4) The immediacy requirement must take into account all the circumstances, including whether the delay was reasonably necessary.

5) One of the circumstances for consideration is whether the police could realistically have fulfilled their obligation to implement the detainee's s. 10(b) *Charter* right to counsel before requiring the sample. If so, the "forthwith" criterion is not meant.

[22] In *R. v. Megahy*, 2008 ABCA 207, the Alberta Court of Appeal made similar statements, at paras. 10 and 11:

> "10 While the "forthwith" requirement pertains to the delay between the time of demand and the provision of the breath sample, the Supreme Court in *Bernshaw* adopted a "flexible" approach. This approach has been applied in subsequent cases of this court. For example, in *R. v. Oduneye* (1995), 169 A.R. 353, this court concluded at para. 30:

> Clearly some short delay will always be necessary. The police officer must identify the driver. He or she must be allowed at least a brief period of observation to ensure that his/her suspicion is reasonable. ... He/she must prepare the apparatus, and explain its use. The police officer may have to secure an accident scene to ensure no further injuries result, or to attend to injured persons. It appears to us that the best definition of forthwith was given by Griffiths, J.A. in *R. v. Lackovic*, (1988), 29 O.A.C. 382; 9 M.V.R. (2d) 229 (C.A.) when he stated at p. 234:
>
> > The demand should be made as soon as is reasonably possible, that is, allowing only such delay as is reasonably necessary to enable the police officer to carry out his duties.

11 Likewise, in *R. v. Kachmarchyk* (1995), 165 A.R. 314 at para. 12, this court observed:

> Though time is clearly of the essence in making the demand once a reasonable suspicion is formed, it does not follow that the demand must be made immediately upon first observing indications that there may be alcohol in the person's body." (my emphasis)

[23] Section 686 of the *Criminal Code* applies to summary conviction appeals by virtue of s. 822(1). Counsel agreed that the ground of appeal potentially applicable to this summary conviction appeal is s. 686(1)(a)(ii), which reads:

> "686. (1) On the hearing of an appeal against a conviction … the court of appeal
>
> > (a) may allow the appeal where it is of the opinion that
> >
> > …
> >
> > (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law…"

Counsel further agreed that because this appeal raises questions of law, the standard of review is correctness: see also *R. v. McCammon*, 2013 MBCA 68, at para. 7. Thus, I

can review the reasons of the trial judge and come to my own independent determination of whether he was correct in his conclusions about Constable Baceda's reasonable suspicion and whether the ASD demand occurred forthwith. I cannot, however, disturb the evidentiary foundation relied on by the judge absent palpable and overriding error in his findings of fact.

ANALYSIS

1. Reasonable suspicion

[24] The appellant's counsel submits that, while the trial judge was satisfied that Constable Baceda *subjectively* suspected the appellant had alcohol in her body, he did not scrutinize Constable Baceda's suspicions for *objectively* ascertainable factors. In other words, the trial judge failed to independently assess whether Constable Baceda's suspicion was objectively reasonable. I disagree. It is true that the trial judge did not expressly state in his reasons that he was undertaking an objective and independent judicial assessment of Constable Baceda's grounds for suspicion, but he did engage in an analysis which accomplished the same end.

[25] At para. 5 of his reasons, the trial judge began by reviewing the facts:

> "5 Let us take a look at the facts of this case. We know that on December 1, 2012, it was very cold. The truck was going up Two Mile Hill and there were no rear lights. The police officer pulled the truck over. The defendant had difficulty opening the door. The police officer noted that there were two cans of Budweiser beer on the dash. The defendant did not have a licence with her. She claimed to have left it at the beer store. Her speech was slow and deliberate. Her motor skills were slow and deliberate. Her driving was fine. She offered a statement to the police officer that she had had one beer at lunch. Her walk back to the patrol car was uneventful. There was a passenger in her vehicle who was passed out."

I pause here to note that although the trial judge made reference to the fact that the appellant's walk back to the patrol car was uneventful, that fact could not have had any bearing on Constable Baceda's suspicion, because it did not take place until *after* he formed the suspicion and made the ASD demand.

[26] In the following paragraphs, the trial judge scrutinizes the various observations made by Constable Baceda and assesses their reasonableness in giving rise to the suspicion, both independently and together. Importantly, he notes how certain observations on their own might be innocent, but in conjunction with other observations, are reasonably capable as being perceived as inculpatory. In doing so, he also applied common sense and practical everyday experience.

[27] Beginning with para. 6 of his reasons, the trial judge stated as follows:

> "6 As we go through these various steps, it is important to realize that some of them, even with the officer's observations at the time, would not be an indicator to give him a reasonable suspicion that there was alcohol in her body; for example, the difficulty opening the door. She and the officer knew that it was a very cold evening in Whitehorse. Her driving was okay. Naturally, that is not an indicator. The two cans of Budweiser beer on the dash in themselves would not be an indicator, but coupled with other facts, would definitely cause the police officer to reflect on what was going on. The explanation given by the defendant that she did not have her licence, having left it at the beer store, would be a potential indicator. She was coming from a beer store, there was beer in her vehicle, and coupled with her explanation, which the officer was free to accept or reject, [of] having one beer at lunch, would add to the grounds as he was building his suspicions.
>
> 7 Her speech was slow and deliberate. Now, it may well be that this could be explained away by the cold; maybe she was tired; maybe she always spoke like that, but the officer did point out that this was not normal. Now, of course, he did not know what was normal for her, but he would be able to know what was normal for most people. He did specifically

> note that her motor skills were slow and deliberate. Again, was that normal for her? Is it normal for most? He indicated to us that he felt that that helped add to his suspicion. The fact that there was a passenger passed out in the vehicle is not an indication in itself because society these days does encourage designated drivers.
>
> …
>
> 9 …[O]verall, it is my view that, based on the fact that her speech was slow and deliberate, which he described as not normal, the fact that there was some beer present in the vehicle, the fact that the defendant did not have her licence, having claimed to have left it at the beer store, and her claim that she did have alcohol in her body earlier in the day, raised this significantly beyond a hunch. We must remember that the officer was not obliged to believe the defendant as to the quantity of alcohol consumed and the time of consumption."

[28] In summary, the factors which the trial judge focused on as objectively reasonable indicators that the appellant had alcohol in her system at the time, viewed together as part of "the totality of the circumstances", were as follows:

- the two cans of beer on the dashboard, within reach of the driver;
- the appellant's explanation that she left her driver's licence at a beer store;
- the appellant's admission that she had consumed alcohol earlier in the day;
- the appellant's slow and deliberate speech, which was not normal for most people; and
- the appellant's slow and deliberate motor skills.

[29] In my view, the analysis undertaken by the trial judge was precisely the type of independent judicial scrutiny anticipated in *Chehil*, as paras. 29 and 31. Further, in concluding that Constable Baceda's suspicion was "significantly beyond a hunch", the

trial judge necessarily had to have been satisfied that there were adequate ascertainable objective grounds for the suspicion.

[30] Having said this, I also agree with the trial judge's assessment that this is a "close case" (para. 23). Indeed, on my review of Constable Baceda's testimony, there were a number of points which gave me reason for pause.

[31] In particular, there were several factors which could be seen as equivocal, neutral or even exculpatory:

- the unremarkable driving by the appellant;
- the absence of an odour of alcohol;
- the appellant's responsive, coherent and unslurred speech; and
- the absence of bloodshot eyes.

[32] Can it be said that Constable Baceda "disregarded" these factors in his assessment of the totality of the circumstances, contrary to the direction in *Chehil*, at para. 33? I think not. The Constable was open and candid in his testimony about all of the relevant factors he observed that evening prior to making the ASD demand. He did not appear to be colouring his evidence to favour the prosecution. Further, he did not rush to judgment in forming his suspicion. Rather, he took some care to reflect upon his observations while he was in the police vehicle running the background checks. While Constable Baceda conceded that he "could have" administered the ASD demand earlier if he had "wanted to", it is apparent from the entirety of his testimony that he specifically chose not to do so. He was entitled to disregard the appellant's information about the timing and amount of her consumption of alcohol. Finally and most importantly, Constable Baceda looked at "the totality of the circumstances", as *Chehil* requires,

before concluding that it was *possible* the appellant still had alcohol in her system at the time of driving. Indeed, his testimony in direct examination included that very type of language:

> "Q: … Is there one of those elements that kind of, for you, was determinative of having a suspicion or --
> A: <u>It was the totality of it all.</u>
> Q: Did one seem more important than the other to you?
> A: Just all pieces of a puzzle." (p. 9) (my emphasis)

[33] In summary, the factors which Constable Baceda focused on informing his suspicion were:

- the beer on the dashboard;
- the slow and deliberate speech;
- the slow and deliberate motor skills;
- the difficulty operating the door window;
- the passed out passenger;
- the truck's rear lights not being on; and
- the admission of drinking that day.[1]

[34] Admittedly, most if not all of those factors, with the exception of the admission of drinking, could have had innocent explanations, especially when considered separately. The trial judge explicitly recognized this in his reasons and based his decision on the cumulative effect.

[35] Before leaving the issue of reasonable suspicion, I feel compelled to deal with the evidence of the absence of an odour of alcohol, which was not specifically analyzed by the trial judge, but is another one of the reasons I see this as a close case. It is

[1] Transcript, p. 14, lines 39-42; p. 19, lines 7 and 8.

common in these types of investigations for the police officer to detect an odour of alcohol, either from the driver's breath or clothing, or from the interior of the motor vehicle. Further, when there has been an admission of prior alcohol consumption, and there is no evidence of an odour of alcohol, one might argue that it would be unreasonable to suspect either relatively recent consumption, or earlier consumption of a significant quantity of alcohol.

[36] However, the only evidence on this point was given in cross-examination, and it was skeletal at best:

> "Q: And you didn't observe any smell of alcohol at that time?
> A: Not at that time, no."

Although the answer suggests that the Constable might have smelled alcohol at another time, there is clearly no evidence in that regard. Nevertheless, defence counsel was less than clear in what she was referring to by "that time". One presumes she was referring to the time when Constable Baceda was having his initial conversation with the appellant at her truck door. However, there were no further questions either in cross-examination or in re-examination to try and determine the circumstances under which the Constable made that observation. For example, such questions might have helped to clarify: (1) whether he had his head near the driver's door window when he first approached; (2) how close he was to the appellant when he was speaking to her; or (3) whether there was a breeze blowing that night which might have interfered with his ability to detect such an odour. In other words, there may well be reasonable explanations for why Constable Baceda did not detect an odour of alcohol. In any event, my concern in this regard does not change my view that the trial judge adequately scrutinized the Constable's reasons for objectively discernible facts capable of

supporting a reasonable suspicion. Nor does it change my independent assessment of the reasonableness of Constable Baceda's suspicion.

2. The "forthwith" requirement

[37] The appellant's counsel submits that Constable Baceda unnecessarily delayed making the ASD demand because he was confused between having a reasonable suspicion that the appellant had alcohol in her system and a reasonable suspicion that she was impaired. Further, as I have noted above, Constable Baceda conceded on cross-examination that he "could have" administered the ASD demand before doing his background cheques in the police vehicle, if he had "wanted to". Thus, the appellant's counsel argues that he ought to have done so without further delay. Rather, she says that when Constable Baceda was determining whether he had the authority to make the ASD demand, it is likely that he was applying a more onerous test to the circumstances, and that this gave rise to an unreasonable or unnecessary delay in making demand.

[38] The trial judge said this about the issue of the "forthwith requirement", at para. 8 of his reasons:

> "8 Interestingly enough, the officer proceeded to go back to his patrol vehicle and there was a five-minute delay from initially speaking to her and when he gave her the demand. He claims that he was reflecting on whether or not he had the requisite grounds for this reasonable suspicion, as opposed to just having a hunch. The five-minute delay from initially speaking to her I believe does fall within the forthwith because the police officer did have the instrument available and he was not unduly delaying the process. It was reasonable for him to go back to the patrol car and check out her licence status and, indeed, her identity when she was unable to produce the licence. In the process of doing so, the officer was also looking for priors and a history while in the patrol car, but, again, according to his evidence, he was continuing to weigh his suspicions but admitted that he could have given the ASD demand at an earlier point."

[39] It is true that Constable Baceda treated a reasonable suspicion of alcohol in the system as being the same thing as a reasonable suspicion of impairment. His testimony repeatedly confirms this:

> "A: … I kind of had suspicions that her ability to operate a motor vehicle was impaired by alcohol….
>
> …
>
> A: … So I had felt like if she even did have her last drink at lunch that she may still have alcohol within her system. So at that time, when I returned back to the vehicle, I provided her with the approved screening device demand…" (p.3)
>
> "A: I started drawing a bit of suspicion that she may have been impaired…" (p.5)
>
> "Q: So then you go and you have another conversation with her; what is that-- what do you tell her immediately when you return to the vehicle? Best of your memory.
>
> A: Best of my memory would be that I believe that she is impaired by alcohol and I asked her if she would be willing to conduct an approved roadside test for impairment, approved screening device.
>
> Q: And then--so-- and you also mentioned you read her the demand?
>
> A: Yes. At the time, from a pre-written card out.
>
> Q: So you read it from the card. And what's Ms. Smarch's response to that?
>
> A: She agreed to it." (p.6)
>
> "Q: … You mentioned two things about your suspicions; you first indicated that you suspected that her ability to drive was impaired.
>
> A: Correct.
>
> Q: And then you mention-- in another of your answer you mentioned that you had the suspicion that she had alcohol in her system. That's-- that's--
>
> A: Correct.
>
> Q: -- that's the words you used. These are two different things. When you say-- is it both or is it one of them?

A: For me it's the same thing.
Q: So when you say you believe she had-- you believe she had either alcohol in her system or her ability to drive might be impaired?
A: Correct.
Q: To you that's the same thing?
A: Yes." (p. 9) (my emphasis throughout)

[40] What then is the significance of this confusion? In order to demand breath samples to determine the concentration of alcohol in her blood pursuant to s. 254(3) of the *Criminal Code*, or to arrest the appellant for impaired driving, Constable Baceda would have to establish that he had "reasonable grounds to believe" that the appellant had just committed an offence of impaired driving or driving over .08, contrary to s. 253(1) of the *Code*. "Reasonable grounds to believe" has been interpreted to be the equivalent of "reasonable and probable grounds": *R. v. Storrey*, [1990] 1 S.C.R. 241. As noted in *Chehil*, at para. 27, reasonable and probable grounds to believe is a more demanding standard than reasonable grounds to suspect, because it requires a belief in the *probability* of a crime rather than suspicion of the *possibility* of a crime.

[41] It seems to me that Constable Baceda's confusion between the two standards would only become significant if there was evidence that he took extra unnecessary time in determining whether he had grounds to demand breath samples under s. 254(3) of the *Criminal Code* or to arrest the appellant for an offence under s. 253(1). However, there is no such evidence. Constable Baceda repeatedly referred to his "suspicion" about impairment interchangeably with his "suspicion" that the appellant may have alcohol in her system, and there is no suggestion that he was applying the higher standard of belief. Further, even if more indicia would be required to reach a suspicion of impairment than a suspicion of alcohol in the appellant's body, Constable Baceda

had made all his observations by the time he returned to his cruiser, and, based on his evidence, it seems that he realized his suspicion of both at the same time. Lastly, in purely logical terms, in order for Constable Baceda to have had a suspicion that the appellant was impaired, he necessarily would have had a suspicion that she had alcohol in her body, as the latter is a necessary, though not sufficient, condition for the former. Thus, I conclude that the confusion was of no significant consequence here.

[42] The appellant was detained for six minutes before the ASD demand was made. The appellant's counsel acknowledges this is a relatively short period of time, but submits that the reason for the delay can take precedence over the actual length of the delay in considering whether it was a breach of the appellant's s. 8 *Charter* right. In that regard, she relies upon *R. v. Ngoyi*, 2014 ABPC 71, where an "unnecessary and unreasonable" delay of as little as five minutes was deemed to constitute a s. 9 *Charter* breach (arbitrary detention) (para. 71). In *Ngoyi*, the police officer mistakenly understood that he was required to read the accused his s. 10(b) *Charter* right to counsel, and provide him with an opportunity to call a lawyer, between making the ASD demand and administering the test. Clearly, there was no legal obligation upon the officer to hold off administering the ASD test in those circumstances, and that is the reason the court found the delay to be both unnecessary and unreasonable.

[43] The case at bar is distinguishable from *Ngoyi* because Constable Baceda's delay in forming his reasonable suspicion, while performing the background checks in his police vehicle, was neither unnecessary nor unreasonable. Further, there is no evidence that the Constable was 'holding off' from making the ASD demand because he thought he needed reasonable and probable grounds to believe the appellant was impaired. The

overall duration of the delay from the time the detention commenced, when the roadside stop began at 7:30 PM, until the fail result was obtained on the ASD, at 7:40 PM, was only 10 minutes. Finally, Constable Baceda made the ASD demand at 7:36 PM, only six minutes into the detention, and the delay between the demand and the provision of the sample was only four minutes. In my view, the lengths of these relatively short delays are among the totality of the circumstances to be taken into account in determining whether the immediacy requirement has been breached.

[44] As I noted above, at para. 32 of these reasons, although Constable Baceda candidly conceded on cross-examination that he "could have" administered the ASD demand at an earlier point in time if he had "wanted to", the trial judge did not interpret that isolated concession as evidence that he had fully formed his reasonable suspicion before returning to the police vehicle, and I agree.

[45] In addition, the evidence of why Constable Baceda routinely performed such background checks, and specifically did so in this case, is also important to my analysis of this ground of appeal. In direct examination, Constable Baceda testified about his reasons for going back to the police vehicle:

> "A: Call dispatch, advise, run and Ms. Smarch, see criminal record, conditions things like that.
>
> Q: Is that—
>
> A: A day timer. It's what I usually do on every pre-roadside stop; I get their information, returned to the vehicle, [indiscernible]—
>
> Q: What was-- sorry, what was the purpose of that?
>
> A: Valid driver's licence. Like, if someone has conditions, they might tell me of demerits. Just to make everything's valid, valid driver's licence, valid licence plate.
>
> …
>
> Q: And once you completed your checks, did you immediately go back to Ms. Smarch's vehicle?

A: I did." (p. 15)

[46] Constable Baceda gave similar testimony in cross-examination:

> "Q: Constable Baceda, were you looking for some information from the people that you are contacting regarding prior consumption of alcohol by her or other alcohol-related offences?
>
> A: Yeah. Priors, any history
>
> …
>
> Q: What was the purpose that you were looking for-- what was the purpose that you'd been looking for prior impaireds?
>
> A: Knowledge. She didn't have a driver's licence so I was making sure she had one, and then I asked for identifiers as well so I can have an idea of what she looked like, to make sure she was who she said she would be.
>
> Q: And to see if she had any prior impaireds?
>
> A: Or conditions, driving disqualifications, demerits." (p.16) (my emphasis)

As noted above at para. 13, it was invariably Constable Baceda's practice to do such checks before administering an ASD test.

[47] The trial judge found that Constable Baceda's conduct in checking the appellant's identity, licence status and history before making the demand was reasonable (see para. 38 above). Again, I agree. In my view, Constable Baceda's practice in this regard simply amounts to a prudent police officer doing his duty to identify a suspect for a driving offence, who is not in possession of a driver's licence. As such, it falls squarely within the third consideration in *Quansah*, i.e. the time between the formation of the reasonable suspicion to the making of the demand and then to the detainee's response "must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2)." Further, as is evident above at para. 22 of these reasons, in quoting from *Megahy*, in *R. v. Oduneye*, (1995), 169 A.R. 353, the Alberta Court of Appeal stated that some short delay will always be

necessary. "The police officer must identify the driver. He or she must be allowed at least a brief period of observation to ensure that his/her suspicion is reasonable…." (my emphasis) The Alberta Court of Appeal in *Megahy* also agreed with the Ontario Court of Appeal in *R. v. Lakovic* (1988), 29 O.A.C. 382, which held that:

> "The demand should be made as soon as is reasonably possible, that is, allowing only such delay as is reasonably necessary to enable the police officer to carry out his duties." (my emphasis)

Finally, the Alberta Court of Appeal in *Megahy* agreed with its earlier decision in *R. v. Kachmarchyk* (1995), 165 A.R. 314:

> "Though time is clearly of the essence in making the demand once a reasonable suspicion is formed, it does not follow that the demand must be made immediately upon first observing indications that there may be alcohol in the person's body." (my emphasis)

[48] Although the trial judge erred slightly in finding that there was only a five minute delay between the initial detention and the ASD demand, when the transcript shows that it was in fact six minutes, the error is not significant. In all other respects, I agree with what the trial judge concluded in this regard.

CONCLUSION

[49] The trial judge did not err in concluding that Constable Baceda had a reasonable suspicion that the appellant had alcohol in her body before making the ASD demand. He properly and adequately reviewed the Constable's reasons for the suspicion and effectively determined that they were objectively sustainable.

[50] The trial judge also did not err in concluding that the delay between the initial detention and the ASD demand, which I have found to be six (not five) minutes, satisfied the "forthwith" requirement. I agree with the trial judge that Constable Baceda's

practice of going back to the police vehicle to check on the status of the appellant's driver's licence, to confirm her identity, and to check for a history of any prior offences, was a reasonable and necessary part of fulfilling his duty as a peace officer in investigating a driving offence. In other words, he did not unduly delay the process.

[51] Thus, the appellant has failed to persuade me that any of her *Charter* rights or freedoms have been infringed. Accordingly, it is unnecessary for me to engage in an analysis of whether the evidence of the breathalyzer results should be excluded under s. 24(2) of the *Charter*.

_____

GOWER J.