IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Hubbard*, 2005 YKSC 9

Date: 20050207
Docket No.: S.C. No. 04-01533
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

RONALD ALLAN HUBBARD

Appearances:
John W. Phelps — for the Crown
Edward J. Horembala, Q.C. — for the Defence

Before: Mr. Justice R.S. Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ronald Hubbard was charged with operating a motor vehicle while impaired under section 253(a) and failing a breathalyzer test under section 253(b) of the *Criminal Code*. The Crown has proceeded on the breathalyzer charge. The defence challenges the admissibility of the breathalyzer certificate under section 8 of the *Charter of Rights* and seeks its exclusion under section 24(2) of the *Charter*. The focus of the defence challenge is the reliability of the “fail” test of a roadside screening device.

THE FACTS

[2] On October 9, 2003, Corporal Gaudet was travelling west on Queen Street in Dawson City. He stopped at the stop sign at the intersection with Third Avenue. This street corner is a block away from three bars that would be open at that time of year. He observed a pickup truck moving north on Third Avenue. The driver of the pickup truck had his headlights on and stopped in the intersection with Queen Street when he had the right of way. The driver stopped for a few seconds, turned on his right signal light and slowly turned right onto Queen Street passing Corporal Gaudet. Corporal Gaudet was suspicious and did a u-turn and followed the pickup truck. Corporal Gaudet did not testify in chief that the truck driver turned on his right signal light. However, using his notes, he acknowledged that the truck driver turned on his right signal light.

[3] The pickup truck travelled slowly, indicating less than 40 k.p.h., to Fourth Avenue. A right turn on Fourth Avenue would reveal a sign indicating that Fourth Avenue was closed for construction between Queen Street and Princess Street. The pickup truck turned right and drove through the construction site as the gates were open and turned left onto Princess Street. Corporal Gaudet stated in chief that the driving pattern indicated the driver was confused. In cross-examination he confirmed that there was nothing unusual about the driving of the accused.

[4] Corporal Gaudet put his flashers on and the pickup truck pulled over into the Shell Station parking lot. It was 9:30 p.m.

[5] The driver got out of the vehicle and Corporal Gaudet approached and asked for his driver’s licence. The driver thumbed through his wallet and produced it, identifying him as Ronald Hubbard.

[6] Corporal Gaudet asked him for the vehicle registration. Hubbard leaned across the seat to the passenger side and took some time to produce it. The pickup truck was registered in the name of a friend.

[7] Corporal Gaudet testified that Hubbard's eyes were red and watery. Corporal Gaudet agreed this could also be the result of fatigue or smoking. He said Hubbard would not talk directly to him but talked to the side. He described his speech as "slightly slurred" but Corporal Gaudet could not describe the words Hubbard used or the conversation. He smelled a strong odour of mouthwash. His notes had the notation AOB meaning "alcohol on breath", but he knew it meant mouthwash.

[8] Mr. Hubbard told Corporal Gaudet that he had been drinking and Corporal Gaudet concluded he had been drinking that evening. Corporal Gaudet testified in chief that Hubbard said that he had had a "couple beers" and picked up some beer. The Corporal's notes said "several beers" and in cross-examination he agreed that "several beers" would be correct as the notes were made simultaneously. He suspected that the mouthwash was a camouflage for alcohol. Corporal Gaudet asked Hubbard to walk back to the police truck. He described Hubbard as slightly swaying but he could not recall how he observed this. He stated that the parking lot had a gravel surface. He also described Hubbard as slow and deliberate and robotic in his examination in chief. In cross-examination he agreed his notes did not confirm this. I find that Corporal Gaudet had no independent memory of the incident and relied upon his notes which he reviewed before trial.

[9] At 9:37 p.m. he read Hubbard the demand to provide a breath sample from a roadside screening device called an Alco-Sensor IV Screener. He took Hubbard's

sample at 9:40 p.m. and it registered "fail", at which time he read the breathalyzer demand and took him to the detachment. Breathalyzer readings were taken and the question is whether the certificate is admissible.

[10] Corporal Gaudet said he was using the Alco-Sensor roadside screening device to confirm his suspicion that Hubbard was impaired or over .08. He also said it was policy to use it. The detachment containing the breathalyzer equipment was only three minutes away. I find that Corporal Gaudet was using the screening device to confirm his suspicion and be sure that he had reasonable and probable grounds to make a breathalyzer demand.

[11] Corporal Gaudet took the training course on the operation of the Alco-Sensor in November, 2000. He stated that he did not use the Alco-Sensor for a period of time after the course.

[12] The training manual has two references to a "15 minute waiting period prior to testing". The first reference states:

> A recent drink of an alcoholic beverage or regurgitation could introduce "mouth alcohol" to the breath thus causing an exaggerated reading. A 15 minute waiting period prior to testing will insure the elimination of "mouth alcohol".

[13] The second reference states:

> **PROCEDURE FOR CONDUCTING A BREATH TEST WITH A/S IV SCREENER**
>
> When using the **A/S IV SCREENER**, the subject can be asked if he has used any alcohol in the last 15 minutes. If his response is negative, test him immediately; if otherwise, wait 15 minutes before testing. If the test result is positive, wait 10 minutes and take a second test. A similar result on the second test indicates true blood alcohol level. A much lower result strongly suggests mouth alcohol was present at the time of the first test.

[14] When Corporal Gaudet was asked about the 15 minute waiting period if alcohol was recently taken, he responded by saying “to be honest” when he stopped Hubbard he was aware of a five minute waiting period if Hubbard had been smoking a cigarette; cigarettes could damage the instrument. It was his understanding that he could wait for five minutes and then do a test without damage to the instrument.

[15] He also admitted that he would not normally wait five minutes to administer the Alco-Sensor. However, he stated that he would wait five minutes if there was something in the person’s mouth such as mouthwash. He agreed that he did not wait five minutes before administering the Alco-Sensor test.

[16] I find as a fact that, at the time of this incident, Corporal Gaudet did not have any knowledge or memory of the 15 minute waiting period if alcohol was recently consumed. While there are other occasions in his evidence which might give the impression that he was aware of the 15 minute waiting period, it was knowledge acquired after this incident.

ANALYSIS

Issue 1 Did the police officer have reasonable and probable grounds to make a breathalyzer demand without relying on the “fail” reading of the roadside screening device?

[17] The first question to determine is whether the police officer had reasonable and probable grounds to make a breathalyzer demand on Mr. Hubbard without a “fail” reading on the screening device. In other words, were the indicia of impairment sufficient in themselves to form the basis for the reasonable and probable grounds required to make the breathalyzer demand? The evidence must establish that the police officer subjectively believed that Mr. Hubbard was impaired and that there were objective grounds for that belief. The objective test is whether a reasonable person standing in the

shoes of the police officer would believe reasonable and probable grounds existed to make the breathalyzer demand.

[18] As to the officer's subjective belief that he had the indicia of impairment, there is no evidence from the police officer so stating. While it could be inferred from his evidence that he did have a subjective belief, I am of the view that his evidence supports the position that he did not have a subjective belief. After reciting all the indicia of impairment, he stated that he suspected that Mr. Hubbard had alcohol in his body. He then read the demand for a sample of his breath by means of an approved screening device. He clearly stated that he demanded a breath sample from the roadside screening device to establish that he could make the demand for a breathalyzer, although he always added that it was required by policy. Thus, I do not find that he had a subjective belief of reasonable and probable grounds without the "fail" reading on the approved screening device.

[19] When the police officer does not have a subjective belief of reasonable and probable grounds, it would be unusual to find objective grounds. From an objective point of view, I find that the officer's evidence boiled down to the fact that Mr. Hubbard's driving was not unusual. His observation of red, watery eyes was not conclusive. His evidence that Mr. Hubbard "slightly slurred" his words could not be related to any words or conversation by the police officer. Similarly, he could not explain how he observed that Mr. Hubbard was "slightly swaying".

[20] The best objective evidence came from Mr. Hubbard himself when he said he had "several beers" and had just come from town where he picked up beer.

[21] There is no requirement that the police officer prove impairment beyond a reasonable doubt at this stage. However, I find the indicia of impairment in this case fall short of reasonable and probable grounds to make a breathalyzer demand. There was no unusual driving and the slight slurring and swaying were not supported by evidence. Something more than the fact that he had alcohol in his body and mouthwash on his breath is required.

Issue #2 Is the "fail" reading from the roadside screening device reliable to provide the reasonable and probable grounds to demand a breath sample under section 254(3) of the *Code*?

[22] There is no doubt that the police officer was correct in demanding that a sample of Mr. Hubbard's breath be tested by a roadside screening device. There was a strong odour of mouthwash, suggestive of an intent to cover up the odour of alcohol. As well, Mr. Hubbard told the police officer that he had several beers. The officer therefore had a reasonable suspicion that he had alcohol in his body while operating a motor vehicle.

[23] The law on roadside screening devices has been established in *Regina* v. *Bernshaw* [1995], 1 S.C.R. 254 and *R.* v. *Einarson* (2004), 70 O.R. (3d) 286 (O.C.A.). A useful summary of these cases was made by Durno J. in *R.* v. *Mastromartino* (2004), 70 O.R. (3d) 540 (Ont. Sup. Ct. Just.) at paragraph 23 as follows:

1. Officers making ASD demands must address their minds to whether or not they would be obtaining a reliable reading by administering the test without a brief delay.

2. If officers do not, or reasonably could not, rely on the accuracy of the test results, the results cannot assist in determining whether there are reasonable and probable grounds to arrest.

3. Officers making ASD demands may briefly delay administering the test if, in their opinion, there is credible evidence which causes them to doubt the accuracy of the test result unless the test was briefly delayed.

> 4. Officers are not required to wait before administering the test in every case where a driver may have been in a bar shortly before being stopped. The mere possibility that a driver has consumed alcohol within 15 minutes before taking the test does not preclude an officer from relying on the accuracy of the screening device.
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> 5. Whether or not officers are required to wait before administering the screening test is determined on a case-by-case analysis, focusing on the officer's belief as to the accuracy of the test results if the tests were administered without delay, and the reasonableness of that belief.
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> 6. The fact the driver is observed leaving a bar is a relevant circumstance in determining whether it was reasonable for the officer to delay the taking of the test in order to obtain an accurate sample. However, officers are not required to ask drivers when they last consumed alcohol.
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> 7. If the officer decides to delay taking the sample and that delay is challenged at trial, the court must decide whether the officer honestly and reasonably felt that an appropriately short delay was necessary to obtain a reliable reading.
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> 8. If the officer decides not to delay taking the sample and that decision is challenged at trial, the court must decide whether the officer honestly and reasonably believed that he could rely on the test if the sample was taken without delay.

[24] The question to be determined is whether the "fail" reading on the roadside screening device can assist in determining that there are reasonable and probable grounds to demand a breathalyzer test. Under normal circumstances a "fail" reading on a properly conducted roadside screening device is sufficient to establish reasonable and probable grounds for a breathalyzer demand.

[25] Based upon the *Bernshaw* and *Einarson* cases, the court takes a flexible approach to section 254(2) so that "the reasonable and probable standard must reflect the particular officer's assessment tested against the litmus of reasonableness" (*Einarson* paragraph 34). Thus, as in paragraph 8 of the above summary of the law, "the

court must decide whether the officer honestly and reasonably believed that he could rely on the test if it was administered without delay" (paragraph 34).

[26] In the case at bar, the issue is whether this officer honestly and reasonably believed that he could rely on the "fail" result of the roadside screening device. The precise question he had to address was whether a delay in the administration of the roadside screening device was necessary. In my view, the circumstances required some consideration of the possibility of recent drinking. The proximity of the bars where Mr. Hubbard was driving, the fact that he had been drinking that evening, the fact that he had just bought beer and the fact that he had a strong odour of mouthwash are all part of the context that the officer had to address in considering whether a delay was appropriate. As stated in *Einarson* at paragraph 34, the decision may be made to proceed with delay or without delay and neither decision suggests the officer acted improperly. However, the decision not to delay or to delay, as the case may be, can be challenged and the court must decide whether the officer honestly and reasonably believed that he could rely on the "fail" result.

[27] I have no question about the honesty of the officer's subjective belief. In his mind, he was acting on a reasonable suspicion and following police policy in administering the roadside screening device.

[28] However, from an objective point of view, I have two problems with the reasonableness of the officer's decision. Firstly, the officer had no knowledge about the operation of the roadside screening device when there was an issue of "mouth alcohol". Quite simply, he was unable to address his mind to whether he could rely on the test result. By his candid admission, for which he should be praised and not condemned, he

had not been trained on this issue. I conclude that, from an objective viewpoint, the officer could not reasonably conclude that the test was reliable.

[29] Secondly, he admitted that his practice was that he would wait five minutes if there was something in the driver's mouth such as mouthwash. He made this admission in the context of his understanding that the instrument might be damaged if Hubbard had been smoking a cigarette. This admission suggests that the officer had incorrect information on the issue from his training.

[30] None of this evidence was in his notes and I have found the officer's evidence to be unreliable when not based on his notes.

[31] I can only conclude that I have no confidence that the officer understood the requirement to address the issue of whether to delay or not. He quite simply failed to address the issue, or addressed it incorrectly and his reliance on the "fail" result was not reasonable.

Issue #3 Should the breathalyzer results be admitted into evidence?

[32] Section 8 of the *Charter of Rights and Freedoms* states that

> Everyone has the right to be secure against unreasonable search or seizure.

[33] In this case, I have found that the officer did not have reasonable and probable grounds for the breathalyzer demand and accordingly there is a breach of section 8 of the *Charter*.

[34] The question remains whether the breathalyzer evidence should be excluded. Counsel did not address this issue expressly and impliedly proceeded on the assumption that if I concluded it was an unreasonable seizure, it would be excluded.

[35] However, I am required to consider whether to exclude the evidence under section 24(2) of the *Charter* which reads:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[36] The question is whether the admission of the breathalyzer evidence would affect trial fairness. Evidence can be categorized as conscriptive or non-conscriptive. Non-conscriptive evidence is evidence that did not result from the participation of the accused in its creation or discovery. It rarely operates to render a trial unfair. Conscriptive evidence is when the accused is compelled to produce bodily samples. It generally renders the trial unfair because the impugned evidence could not have been obtained in any other manner. Thus, the breathalyzer readings would not have been obtained absent the breach of section 8 of the *Charter* and their admission into evidence would render this trial unfair and bring the administration of justice into disrepute.

[37] The breathalyzer evidence is excluded under section 24(2) of the *Charter*. Mr. Hubbard is not guilty of Count #2 of the Indictment under section 253(b) of the *Criminal Code*.

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VEALE J.