

ONTARIO COURT OF JUSTICE

DATE: March 27, 2024
COURT FILE No.: 3811-998-22-38101126

BETWEEN:

HIS MAJESTY THE KING

—and—

M [REDACTED] C [REDACTED]

Before Justice Robert Gattrell
Heard on January 15, January 25, 2024
Reasons for Judgment released on March 27, 2024

K. Cinerari.....counsel for the Crown
M. Montes.....counsel for M [REDACTED] C [REDACTED]

GATTRELL J.:

[1] M [REDACTED] C [REDACTED] is charged with impaired operation of a conveyance and failing or refusing to comply with a demand for a breath sample.

[2] The charges arose from a driving incident on March 12, 2022. Ms. C [REDACTED] was driving some friends home from the Queen's Hotel in downtown Barrie. As she proceeded along Mulcaster Street towards the lakefront, the left front tire of her vehicle went up onto a median curb that separated her lane from the oncoming lane of traffic. The front of her vehicle momentarily mounted the curb and then came back down in her lane. This was witnessed by two police officers who were on patrol in a marked police cruiser.

[3] They conducted a traffic stop of Ms. C [REDACTED]'s vehicle at about 1:53 a.m. Constable Dubois spoke to her while she sat in the driver's seat of her vehicle. He

detected slurred speech. She was smoking a cigarette. She had passengers in the vehicle who appeared to be drunk. She said she had consumed one drink that evening, at 10:00 p.m.

[4] Constable Dubois demanded that Ms. C [REDACTED] provide a sample of breath into an Approved Screening Device (ASD). He did not have such a device with him. He received one from another police officer who had arrived at the scene. Ms. C [REDACTED] stood outside her vehicle and provided samples into the device. After six unsuccessful attempts, a "Fail" was registered on her seventh attempt.

[5] As a result, Constable Dubois arrested Ms. C [REDACTED] and made a further demand, pursuant to s.320.28 of the *Criminal Code*, to provide breath samples into an Intoxilyzer instrument at the police station.

[6] Ms. C [REDACTED] was taken to the police station and turned over to a qualified breath technician. She provided breath samples on nine occasions into an Intoxilyzer instrument. No sample was suitable. After nine attempts, the technician stopped seeking further samples, as he believed that Ms. C [REDACTED] was malingering.

[7] During the trial, the court heard from Constable Justin Dubois, his partner Constable Josh Ford, breath technician Constable Grzegorz Donaj, M [REDACTED] C [REDACTED] and S [REDACTED] W [REDACTED]. The court also viewed body camera footage from the roadside and footage from the breath room at the station.

[8] There are two issues before the court. The first issue, on the refuse charge, is whether Constable Dubois made a valid breath demand pursuant to s.320.28 of the *Criminal Code*. The second issue is whether the Crown has proven impairment beyond a reasonable doubt.

[9] The issue with respect to the breath demand turns on whether Constable Dubois could properly rely on the "Fail" result on the ASD as a basis to make the demand.

[10] Counsel for Ms. C [REDACTED] relies on the case of *R. v. Jennings*, 2018 ONCA 260. A police officer must have reasonable and probable grounds to demand a breath sample pursuant to s.320.28 of the *Code*. A failure on an ASD may provide grounds for

the police officer to believe that the person has more than the legal limit of alcohol in her system.

[11] The belief must be subjectively held, and it must be objectively reasonable. In other words, there must be objective grounds to support the police officer's subjective belief.

[12] The police officer is not required to be an expert in the operation or use of the ASD but there must be some objective basis for the officer's belief that the results of the particular device can be relied on. There is no one way to establish this but there must be some evidence before the court that would allow a trier of fact to find that the subjective belief was objectively reasonable.

[13] Constable Dubois received an ASD from Sergeant Henderson at the scene. He received no information from Sergeant Henderson about the device itself.

[14] There was a tag on the device showing when the device was last calibrated. In cross-examination, Constable Dubois seemed to agree that he did not look at the calibration date until after the event, when he was making his notes back at the station. When this issue was revisited later in cross-examination, Constable Dubois said that he could not recall if he looked at the calibration date before the test or later back at the station.

[15] The device had in fact been calibrated two days earlier. This would have supported a belief in its reliability but only if the officer knew this at the time he used the device. On this evidence, the court cannot find that Constable Dubois knew this at the time and, indeed, I find that it is more likely that he checked this later.

[16] Constable Dubois testified that if he had taken an ASD from the station to have with him on patrol, he would have done a self-test on the device at the beginning of his shift to satisfy himself that the device was working properly. He did not do a self-test on this ASD, and he had no information that anyone else had. He could have done a self-test at the scene before using the device on Ms. C██████████, but it did not occur to him to do so.

[17] Not all shortcomings in an officer's knowledge about the device or in its use will necessarily be fatal to the reasonableness of a belief that the device is functioning properly. There were other issues raised by defence, such as Constable Dubois' uncertainty as to the exact messages displayed on the device and not knowing the units of what the device was measuring.

[18] He knew to wait 15 minutes before using the device if he believed the subject had consumed alcohol in the last 15 minutes, but he did not know if there was a similar rule when the subject had just been smoking.

[19] These concerns on their own will not necessarily be fatal to the reasonableness of the officer's belief, although they form part of the total picture of what occurred. As such, they tend to highlight a loose grasp on what needed to be considered when using such a device. I agree with the defence that it seems like the officer had not really turned his mind to the issue of the reliability of this particular device on this particular occasion.

[20] It is not enough to identify problems in the procedure, however. The court must go farther and "determine how or whether each of the specific failures identified undermines the reasonableness of the officer's belief that the ASD was functioning properly": *R v Jennings, supra.* at ¶17.

[21] In the instant case, the officer did not know if and when the device had last been calibrated. There was no known self-test by any police officer before the device was used on the accused. In the circumstances, the court finds that the officer's belief in the proper functioning of the ASD was not objectively grounded and was therefore not reasonable. The s.320.28 breath demand was therefore not valid.

[22] Counsel agreed that, in the absence of a valid demand, there can be no basis for a refuse conviction. Accordingly, the refuse charge must be dismissed.

[23] Ms. C [REDACTED] testified. She is 71 years old. She has a number of physical ailments and afflictions that she says affected her ability to provide breath samples. These include emphysema and chronic obstructive pulmonary disorder (COPD). She also has tendonitis. She has trouble breathing. She experiences frequent coughing fits.

[24] Ms. C [REDACTED] said she had been out with friends in downtown Barrie. Although her friends were drinking, Ms. C [REDACTED] said that she had only one alcoholic drink because she was the designated driver. That drink was at about 10 p.m.

[25] Ms. C [REDACTED] explained that just before she hit the median with the tire of the left front wheel of her car, she had had one of her not infrequent coughing fits. This distracted her as she went around the curve on Mulcaster Street. This evidence was confirmed by her friend, S [REDACTED] W [REDACTED], who was in the car with Ms. C [REDACTED]. Ms. Walter also confirmed the coughing fits generally.

[26] The median in question was located at a point where Ms. C [REDACTED]'s lane turned sharply to the right at the bottom of a hill. So, while the driving error was noteworthy it was not as egregious as it would have been had this occurred along a straight stretch of road.

[27] When the police tried to put Ms. C [REDACTED] in handcuffs she can be seen to pull away. They thought she was trying to run. Ms. C [REDACTED] testified that placing her arms behind her back caused her pain due to her tendonitis. She was not trying to run but reacting to the pain. In the camera footage, she can be heard saying "Ow". The court cannot discount her evidence on this point, which means it will not be considered as a sign of impaired behaviour.

[28] Ms. C [REDACTED] testified that she was genuinely trying to provide suitable breath samples both at the roadside and at the station. Her physical infirmities made it difficult to blow. Her anxiety made it hard to follow instructions.

[29] Her evidence differed from that of the police. They said that air was escaping around her lips when she was blowing into the ASD and the Intoxilyzer. This suggests that the failure to get suitable samples was not simply an inability to blow in a sustained fashion.

[30] Her repeated unsuccessful attempts to provide breath samples could be seen as a result of Ms. C [REDACTED]'s physical challenges, a further sign of impairment, or malingering. Malingering could support an inference of a guilty mind. While the court

prefers the evidence of the police, and I suspect that Ms. C [REDACTED] was malingering, the court is not able to reject her evidence on this point.

[31] With respect to impairment, the body-worn camera footage confirmed the police testimony (except with respect to odour of alcohol) but did not add anything to it as far as signs of impairment. The Crown did not suggest that it did.

[32] The police at the roadside did not immediately arrest for impaired but felt they needed to use a screening device. Constable Dubois made an additional observation, after the screening device demand was made, that the accused had the odour of an alcoholic beverage on her breath. As the defence pointed out, Ms. C [REDACTED] had already admitted to consuming alcohol, so the odour just confirmed what the officer already believed – that she had alcohol in her system. The court does not find that this one further observation transformed suspicion of impairment into grounds to believe.

[33] Constable Dubois described Ms. C [REDACTED] as belligerent. She was not physically aggressive but having heard some of her commentary from the body worn camera footage, the court would describe her as obnoxious. For example, she noticed that Constable Dubois had a French surname and said he should not be working in Barrie but should go to Quebec. This may have been the alcohol talking but, on the other hand, it may just reflect her general personality.

[34] Aside from repeated failed attempts to provide breath samples at the station there was no additional evidence of impairment from the breath technician. He noted an odour of alcohol on Ms. C [REDACTED]'s breath and no other signs of impairment.

[35] The police at the roadside saw the need to use a screening device. Cst Dubois had a suspicion with respect to impairment but not a belief. It is difficult for the court to make a finding beyond a reasonable doubt on evidence that did not get the officer at the scene beyond suspicion. This will not necessarily be the result in all cases in which an ASD was used, as there may be additional evidence of impairment before the court that was not initially apparent to the police officer. However, that is not the situation here.

[36] The court is suspicious that Ms. C [REDACTED] was impaired but, on the totality of the evidence, the court is not satisfied of this beyond a reasonable doubt.

[37] Both of the charges before the court will be dismissed.

Released: March 27, 2024



Signed: Justice Robert Gattrell