IN THE PROVINCIAL COURT OF SASKATCHEWAN

Citation: 2011 SKPC 141

Date: September 9, 2011
Information: **24298654**
Location: Yorkton

Between:

Her Majesty the Queen

- and -

Kenneth Walter Kukrudz

Appearing:

Mr. B. Stricker — For the Crown
Mr. N. Robinson — For the Accused

DECISION **E.S. BOBOWSKI, J**

I. INTRODUCTION

[1] The accused stands charged that:

> on or about the 15th day of October A.D. 2010 at Moosomin, in the Province of Saskatchewan did while his ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle contrary to section 253(1)(a) of the *Criminal Code.*
>
> on or about the 15th day of October A.D. 2010 at Moosomin, in the Province of Saskatchewan did having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate to wit: a motor vehicle contrary to section 253(1)(b) of the *Criminal Code*.

[2] The trial was held July 19, 2011 in Moosomin which proceeded by way of *voir dire* in connection with various *Charter* issues raised by Defence. The Crown called one civilian witness and two police officers. Defence called no evidence. The evidence of the *voir dire* was applied to the trial proper by consent. The Crown then closed its case and the Defence elected to call no evidence on the trial proper.

II. ISSUES

[3] The issues:

> *a) Was the accused arbitrarily detained contrary to section 9 of the Charter?*
>
> *b) Was the accused promptly informed of the reason for detention and was he informed of the right to retain and instruct counsel without delay in accordance with section 10 of the Charter?*
>
> *c) Was the demand on the approved screening device made forthwith in accordance with the Criminal Code?*
>
> *d) Was the approved screening device an approved instrument in accordance with the Criminal Code?*

III. FACTS

[4] Mr. Don Bleau, owner/operator of Don's Towing and Transport, Moosomin, Saskatchewan, was on his way home with an empty unit after completing a tow to Regina, Saskatchewan. He stated that somewhere between Whitewood and Wapella he noticed a vehicle coming up behind him at an estimated speed of 130 k.p.h. Mr. Bleau was in the right driving lane of the two lane Trans Canada Highway #1. The other vehicle was in the passing lane when the vehicle crossed from that lane causing Mr. Bleau to veer to the right shoulder. The vehicle narrowly missed the front side of the tow truck. After it passed, it veered off into the left lane kicking up gravel for approximately a second or two on the left shoulder and then it veered off to the right lane travelling at the same speed.

[5] As a result of the erratic driving of the vehicle and being concerned for the safety of himself and other users of the highway, Mr. Bleau called Cst. Pshyk using his cell phone and advised him as outlined above, that the driver was either drunk or fatigued and gave a description of the vehicle. He then followed the vehicle into Moosomin, never losing sight of it up to the time it was stopped by Cst. Pshyk.

[6] Cst. Kevin Granrude was on duty in the Town of Moosomin and received a call from Cst. Pshyk at approximately 9:00 p.m. and as a result, about a minute later, he delivered an approved screening device pursuant to the provisions of the *Criminal Code* of Canada to Cst. Pshyk describing it as a Draeger 7140.

[7] Cst. Pshyk testified that at approximately 8:45 p.m., he called Mr. Bleau after being advised by an off duty constable that Mr. Bleau had called. Mr. Bleau described particulars of a vehicle that was driving erratically at a high rate of speed and that the operator might be impaired or drunk. Cst. Psyhk intercepted the vehicle at Moosomin and after he engaged his emergency lights, the vehicle came to a stop in a normal manner.

[8] As Cst. Pshyk approached the vehicle to obtain the driver's licence and registration, he noticed that the driver and sole occupant had a freshly lit cigarette and believed that the driver was possibly masking an odour. The officer then asked him if he had anything to drink. After a slight hesitation Mr. Kukrudz replied “no” and advised Cst. Pshyk that he was texting while driving. The officer then asked Mr. Kukrudz to step out of his vehicle and off to the side of the road and again asked if he consumed anything that evening and was told by Mr. Kukrudz that he had a Whites Rechers Red beer, in Regina before he left.

[9] Thereupon Cst.. Pshyk instructed him that he was being detained for the investigation of erratic driving and placed him in the rear seat of the police vehicle closing the silent patrolman.

[10] At the time, Cst.. Pshyk stated he was contemplating charging Mr. Kukrudz with offences under *The Traffic Safety Act* of possibly speeding and driving without due care and attention.

[11] While in the police vehicle, Cst.. Pshyk asked Mr. Kukrudz if there was any alcohol or illicit drugs in his vehicle. Mr. Kukrudz denied that there was and Cst. Pshyk asked if he could search the vehicle and Mr. Kukrudz agreed.

[12] After finding no alcohol or drugs, Cst.. Pshyk returned to the police vehicle, opened the silent patrolman and detected an odour of liquor emanating from Mr. Kukrudz.

[13] At that point Cst. Pshyk had a suspicion that he had consumed alcohol that evening and radioed Cst. Granrude to attend with an approved screening device who arrived within minutes.

[14] The demand for a sample into an approved screening device described by Cst. Pshyk as an Alcotest Draeger, was made at 9:05 p.m., Mr. Kukrudz complied and blew a fail. Even though Mr. Kukrudz told Cst. Pshyk about prior consumption of beer in Regina and his cell phone usage, he did not believe any of those statements by the accused because of his previous denial. After Mr. Kukrudz failed he was asked again how much he drank and was told that he had a Caesar and pint of beer with supper before leaving Regina.

[15] Cst. Pshyk placed Mr. Kukrudz under arrest for impaired driving, read him his rights to counsel and the police warning and made a breath demand at 9:14 p.m. Mr. Kukrudz understood all that was read to him.

[16] He was taken to the Broadview Detachment for the test arriving at 10:02 p.m. The Moosomin facility where the approved instrument was housed was under construction.

[17] While Cst.. Shortland, the breath technician, prepared the instrument to provide samples, Mr. Kukrudz asked to speak with counsel and after having done so, he provided two samples with readings of 110 and 100. Thereafter Cst.. Pshyk served a true copy of the Certificate of Analyses on Mr. Kukrudz along with other court documents.

[18] In cross-examination, Cst.. Pshyk admitted that once Mr. Kukrudz admitted to the consumption of beverage alcohol, i.e. the Whites Rechers Red Beer, he had a reasonable suspicion of alcohol being in the body of Mr. Kukrudz.

IV. DETERMINATION OF THE ISSUES

a) Was the accused arbitrarily detained contrary to s. 9 of the Charter?

[19] Defence counsel submits that once Mr. Kukrudz admitted he had one beer, Cst.. Pshyk had a reasonable suspicion that Mr. Kukrudz had alcohol in his body and by placing him in the police car, Mr. Kukrudz was arbitrarily detained. Even though Cst.. Pshyk admitted in cross-examination he had a suspicion, I am satisfied on the evidence that it was not a reasonable suspicion because Cst.. Pshyk did not believe Mr. Kukrudz, with respect to the beer since the accused already stated to him that he had consumed no alcohol. Furthermore, Mr. Kukrudz did agree to have his vehicle searched. At that time, where was the most logical place for Mr. Kukrudz to be placed. It would be too dangerous to leave him standing on the highway and for his own safety he was placed in the police car. In light of these circumstances, I cannot conclude that the detention was arbitrary. Even if the Court is wrong in reaching this conclusion, the Court would not be inclined to exclude the Certificate of Analyses pursuant to s. 24(2) of the *Charter* having regard to the *Grant* analysis in that firstly, the infringement was not serious since Mr. Kukrudz was placed in the police vehicle for his own safety. Secondly, the short period of detention indicates the impact of the breach on the accused's right to be free from arbitrary detention was minor. There was no further intrusion into his privacy, or bodily integrity or dignity. And, thirdly, society has an obvious interest in litigating the matter on the merits. The issue of impaired driving and the potentially serious consequences thereof, including endangering the lives of others, leads to the inclusion of the evidence.

[20] Accordingly, in all of the circumstances, the admission of the Certificate of Analyses would not bring the administration of justice into disrepute. The decision of our Court of Appeal in *R. v. Anderson*, [2011] 5 W.W.R. 495, was most helpful in reaching my determination of this matter.

b) Was the accused promptly informed of the reason for his detention. and was he informed of the right to retain and instruct counsel without delay in accordance with s. 10 of the Charter?

[21] The Supreme Court of Canada in *R. v. Suberu*, [2009] 2 S.C.R. 460, is most instructive in this regard. At paragraph [2] McLachlin C.J.C. stated:

> The specific issue raised in this case is whether the police duty to inform an individual of his or her s. 10(b) *Charter* right to retain and instruct counsel is triggered at the outset of an investigation detention — a question left open in *R. v. Mann*, [2004] 3 S.C.R. 59, at para. 22. It is our view that this question must be answered in the affirmative. The concerns regarding compelled self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. Therefore, from the moment an individual is detained, s. 10(b) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel "without delay". The immediacy of the obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the *Charter*.

[22] The detention herein was as a result of Mr. Kukrudz agreeing to have his vehicle searched and he was placed in the police vehicle for his own safety thus coming within the exception of the rule. Accordingly, no s. 10 rights were infringed.

c) Was the demand on the approved screening device made forthwith in accordance with the Criminal Code?

[23] I am satisfied on the evidence that Cst.. Pshyk's belief that the accused had alcohol in his body did not become a reasonable suspicion until such time as he smelled liquor emanating from the accused in the police car. The demand for a sample on an approved screening device was made at 9:05 p.m. No more than seven or eight minutes passed before the demand was made which was spent by conversation with the accused and the search of his vehicle. The test was done at 9:09 p.m. allowing a few minutes for the device to be delivered by Cst. Granrude. In these circumstances, I am satisfied the demand was made forthwith notwithstanding the minor delay, *R. v. Billette* 2001,

SKQB 150, wherein, after canvassing Supreme Court of Canada decisions, Ryan-Froslie J. stated at P-7:

> Forthwith" means as quickly as possible in the circumstances.

d) Was the approved screening device an approved instrument in accordance with the Criminal Code?

[24] On the evidence, both Cst. Granrude and Cst. Pshyk did not specifically describe the device in accordance with the *Regulations*. However, each of them described the instrument as an approved screening device.

[25] In the recent case of *R. v. Helm*, 2011 SKQB 32, Mr. Justice Popescul stated at para. 24:

> It is an error in law to hold that the use of a shorthand description of the device employed, in the absence of any other evidence that the device was not approved, means that the device was not approved and cannot be used as the basis for the officer's requisite reasonable and probable grounds. This amounts to applying the wrong legal approach to the proof of the charge that was before the Court. The court is entitled to draw reasonable inferences from all of the facts. The officer referred to the device as an "ASD", which, in all of the circumstances, could only mean that she used that term as an abbreviation for an "approved roadside device". Furthermore the fact that the officer described the machine as an "Alcotest 7410", rather than using the full trade name used in the regulations, such as the "Alcotest ® 7410PA3" or "Alcotest ® 7410GLC", is of no legal consequence. To hold that the officer must use terminology that precisely matches the gazetted regulations is an error in approach that amounts to an error in law. See *R. v. MacLeod*, 2009 YKCA 5, 79 M.V.R. (5th) 171, where in similar circumstances, the Yukon Court of Appeal held that a trial judge's finding that the screening device used must precisely match the devices listed in the regulations is an error in law.

[26] In reaching his conclusions, Popescul J. considered a relied upon Ontario Court of Appeal decision in *R. v. Gundy*, 2008 ONCA 284, 57 C.R. (6th) 369, para. 47 which states as follows:

> In my view, cases holding that the officer did not have reasonable and probable grounds because, although the officer referred to the device as an approved screening device, he or she used shorthand reference to the device or transposed

> some of the numbers or letters are wrongly decided. In the absence of some credible evidence to the contrary, it is not reasonable to infer that an officer who says that he or she used an approved screening device actually used an unapproved device. That was the holding of this court in *R. v. Kosa* (1992), 42 M.V.R. (2d) 290 (Ont. C.A.), at 291.

[27] Crown has proven beyond a reasonable doubt that the instrument used herein was an approved screening device within the meaning of the *Criminal Code*.

[28] I find the accused guilty of Count 2 in the information of driving over .08. On the whole of the evidence I am not satisfied beyond a reasonable doubt on the guilt of the accused on Count 1 of impairment and find him not guilty of that charge. The erratic driving could have been due to fatigue and besides the smell of liquor there is no other credible indicia of impairment.

DATED at the City of Yorkton, in the Province of Saskatchewan this 9th day of September, A.D. 2011.

E.S. Bobowski, J