R. v. McIlveen, [2015] O.J. No. 7320

Ontario Judgments

Ontario Court of Justice

F. Javed J.

Heard: May 6, 2015.

Oral judgment: May 6, 2015.

Released: May 12, 2015.

[2015] O.J. No. 7320

Between Her Majesty the Queen, and Debbie ***McIlveen***

(29 paras.)

Counsel

H. Bayley, counsel for the Crown.

M. Engel, Counsel for the defendant Debbie ***Mcilveen***.

Reasons for Judgment

1 F. JAVED J. (orally):-- The defendant, Debbie ***McIlveen*** stands charged on an information alleging the offences of Impaired Driving and Over 80. On May 6, 2015, the trial commenced before me with an application under the *Charter of Rights and Freedoms.* I delivered an oral judgment finding that the investigating officer did not have the requisite reasonable and probable grounds to make a breath demand. For reasons that I will expand upon below, I was advised by the parties that my ruling on the motion was dispositive of the case on the merits. As such, I found the defendant not guilty on both counts.

2 The defendant was stopped by the police and investigated for drinking and driving related offences. She was arrested for impaired operation, handcuffed to the rear and escorted to the police cruiser. She provided two samples of her breath registering readings above the legal limit. The live issues at the trial were framed by the defendant as follows:

(a) Whether the defendant's rights under s.8 of the *Charter* to be secure from an unreasonable search and seizure were violated on the basis that the police did not have the requisite reasonable and probable grounds to make the breath demand;

(b) Whether the defendant's right to fundamental justice under s.7 and the right to be free from cruel and unusual punishment under s.12 of the *Charter* were violated on the basis that the defendant was handcuffed where there was no basis for doing so; and

(c) Whether there was a violation of the defendant's right to counsel guaranteed under s.10(b) of the *Charter.*

3 Prior to my ruling, I was advised by the parties that the Crown would not be proceeding on the Over 80 count, and as such, that count was withdrawn. I was also advised that as a result, the defence was abandoning the right to counsel argument and only two issues as framed above, remained.

4 The evidence on the trial and *Charter* issues proceeded, on agreement of the parties, in a blended fashion.

The Facts

5 Police Constable Robert Aukuma testified that on July 1, 2014, he was traveling northbound in a marked police truck on Simcoe street in Port Perry with his partner Constable Jamie McMaster. He noticed that a motor vehicle, later identified to be that of the defendant, was traveling southbound traveling 60km/hour in a posted 80km/hour zone. As he passed the vehicle, he saw from his rear view mirror that the vehicle crossed the center line momentarily causing a quick "jerking" of the vehicle. He acknowledged that low speed alone was not a cause of concern.

6 He became concerned about this activity and decided to investigate further. He effected a u-turn and followed the vehicle for less than 2 minutes. He testified that the vehicle continued "weaving" in its lane. He noted that the vehicle did accelerate to 75km/hour, thus was satisfied that it must have been the driver itself, as opposed to any environmental factors that caused the driving. The weather on this summer day was dry, warm, with no precipitation.

7 He signalled to the vehicle to pull over using his lights. He did not have a siren at the time. The vehicle did not immediately stop but eventually broke abruptly and moved to the west shoulder. The vehicle came to a stop with the half the vehicle on the shoulder and the other on the roadway. He proceeded to the driver's side window and his partner went to the passenger window. The defendant first responded to PC McMaster's commands who was situated at the passenger side as opposed to acknowledging him which he thought was odd.

8 He observed that the defendant had "bushy" red hair and had a grey sweater and appeared to be flustered. Her eyes "seemed" to be red and were also watery and shiny. He detected a "strong" or "obvious" odour of alcohol emanating from her breath. He inquired if she drank alcohol to which she responded "not that much" followed by "one beer at the casino".

9 At 1:35 a.m., PC Aukuma formed what he testified to as reasonable and probable grounds to arrest the defendant for the impaired operation charge. She was asked to step out of the vehicle, which she did without difficulty. She was wearing white sandals. She was handcuffed to the rear and escorted to his police cruiser. During the escort, she appeared to be slightly weaving by angling to the left, even though the distance to the cruiser was "dead straight". He thought this was indicative of impairment by alcohol.

10 PC Aukuma is 6'5 and weighs almost 300 pounds, hence the use of the police truck as opposed to a cruiser. The defendant was 52 years old, 5'5 in height and weighed 130 pounds. When asked why he felt the need to control her movements given their disparity in size and weight, he responded, that he needed to control her direction to avoid a situation where she would fall or run away. He continued to make observations and noted that when she attempted to enter his vehicle, while handcuffed to the rear, she had difficulty foisting herself onto the backseat. The vehicle was a Chevrolet Tahoe, best described as a small truck with approximately 8-10 inches of clearance. The defendant asked him for help saying "I've never done this before". He thought this was an odd comment. Ultimately, he helped to get her into the vehicle.

11 PC Aukum a was cross-examined on his basis for handcuffing the defendant. He testified that there were many reasons, mainly relating to officer safety and safety of the public. He added that people who consume alcohol can become violent and unpredictable. He was taught at police college that some individuals can even shift their handcuffs from the back to front causing security concerns. He added that in this case, he placed the defendant in the rear of his vehicle because it places the detainee at a disadvantage and prevents them from accessing weapons.

12 In cross-examination, it was suggested to him that notwithstanding any training, the situation before him presented no danger and there were no safety concerns. While the defendant was cooperative and polite, he testified that there's "always a concern about officer safety".

13 During the transport, he continued to smell an odour of alcohol from her. Prior to this, he had searched her vehicle incident to arrest and located a bottle of white wine which had a broken seal. It also appeared that a small amount had been re-moved. He disagreed with the suggestion that the odour of alcohol he smelled at the roadside could also have come from the bottle of wine.

14 At 1:39 am, he advised the defendant of her rights to counsel.

15 At 1:50am, the defendant arrived at the police detachment and was paraded before another officer. In cross-examination, I was able to view the videotape of the sally port area as well as her demeanour in the breath room. During this video, PC Aukuma testified that he could still see that she was not able to walk fully straight and veered to the left, although this was in a confined area as opposed to the roadway where he made his initial observations. With respect, I disagree with this observation but I will return to this later in my findings. The video recording also shows the defendant walking from the vehicle to the detachment and into the breath room. There is nothing remarkable about her ability to walk, which is depicted on the video.

16 At 1:58am, a call was placed to duty counsel. The defendant spoke to duty counsel in private and the call was completed at 2:15 am.

17 At 2:46 am, the defendant was turned over to a qualified breath technician, PC Rathwell and blew over the legal limit. She was ultimately released on a Form 9 after being charged with the criminal offences.

18 The sum total of PC Aukuma's indicia of impairment can be summarized as follows:

* Driving under the speed limit by 20km/hour;
* Momentary crossing into the centre lane;
    * Slow and deliberate movements at the roadside after being asked to pull over;
    * Pulling over the vehicle with half on the shoulder and half on the roadway;
* Odour of alcohol on her breath;
* Eyes that seemed to be red, glassy
* Admission of the consumption of alcohol;
    * Not being able to walk straight at the roadway and breath room as depicted on the video;
* Unsteadiness in getting into the vehicle.

The Position of the Defence

19 Mr. Engel on behalf of the defendant argued that viewed as a whole, PC Aukuma did not have the requisite reasonable and probable grounds to arrest the defendant and ostensibly, did not have the grounds to make a lawful breath demand under the *Criminal Code*. He did not raise a complaint under s.9 of the *Charter.* He also submitted that the routine practice of handcuffing arrestees is a breach of s.7 and s.12 of the *Charter.* In submissions, he conceded that the issue as framed was "novel" and relied on jurisprudence in the context of handcuffing prisoners in the courtroom as analogous authority for his proposition. He also argued that the onus would be on the Crown to disprove the unreasonable use of force if I found that it' was an excessive use of force. With respect to the remedy, he sought to exclude the observations of "impairment" of PC Aukuma after the defendant had been handcuffed and was escorted to his vehicle.

The Position of the Crown

20 Ms. Bayley submits that PC Aukuma did have reasonable and probable grounds to make the breath demand and in turn, to arrest the defendant for impaired operation. In addition, she submits there was no breach of s.7 and s.12 of the *Charter* as the use of handcuffs was lawful given the officer safety issues. Finally, she submits that the onus does not shift to the Crown and remains on the defendant to prove the violation(s) on a balance of probabilities.

Analysis

21 In *R. v. Stellato, [1993] O.J. No. 18* (C.A.), aff'd [1994)2 S.CR. 478, the Ontario Court of Appeal at paragraph 14 held that "if the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence of [impaired care or control] has been made out". In *R. v. Bush,* [2010) O.J. No. 3453 (C.A.) the Ontario Court of Appeal, citing with approval the decision of *R. v. Censoni,* [2001) O.J. No. 5189 (Sup. Ct.) further held at para 47, that "slight impairment to drive relates to a reduced ability in some measure to perform complex motor function whether impacting on perception or field of vision, reaction or response time, judgment and regard for the rules of the road".

22 Section 254(3) of the *Criminal Code* authorizes peace officers to demand lntoxilyzer breath samples provided the officer has "reasonable grounds to believe that a person is committing or at any time within the preceding three hours has committed" the offence of impaired operation or driving over 80. Reasonable

and probable grounds does not amount to proof beyond a reasonable doubt or to a prima facie case: see *Censoni, supra;* at para 31 and *R. v. Sheperd,* [2009]2 S.C.R. 527, [2009] S.C.J. No. 35, 2009 SCC 35 at para 23.

23 The Ontario Court of Appeal described this test further in *Bush, supra* at par.a 38:

> Reasonable and probable grounds have both a subjective and an objective component. The subjective component requires the officer to have an honest belief the suspect committed the offence: *R. v. Bernshaw,* [1995]1 S.C.R. 254 at para. 51. The officer's belief must be supported by objective facts: *R. v. Berlinski,* [2001] O.J. No. 377 (C.A.) at para. 3. The objective component is satisfied when a reasonable person placed in the position of the officer would be able to conclude that there were indeed reasonable and probable grounds for the arrest: *R. v. Storrey,* [1990]1 S.C.R. 241 at p. 250.

24 Having fully considered the matter, I am of the view that PC Aukuma fell short of acquiring the requisite reasonable and probable grounds to make a lawful breath demand and in turn, to arrest the defendant for impaired operation. In particular, while I find that he held the subjective belief that the defendant was impaired by alcohol, this belief was not objectively reasonable. In other words, having regard to all the constellation of factors, I find that a reasonable person in his shoes, with his training and experience could not have objectively believed that there were sufficient grounds for her arrest. I arrive at this conclusion for the following reasons:

a) the defendant's slow speed (20km under the speed limit) is no indicator of impairment. PC Aukuma acknowledged as much;

b) pulling over one's vehicle to a shoulder after being signalled to pull over by a police officer, is in my view, a neutral factor going to impairment. I am buttressed in my view that the defendant was nervous during the ordeal which may have resulted in her behaviour when she said to the officer "I've never done this before";

c) the admission of alcohol is a positive factor of impairment but does very little in assisting an investigating officer as to when alcohol was consumed;

25 In addition, there are two important factors which the Crown relied on which in my view simply don't support the objective grounds PC Aukuma relied on to form his reasonable and probable grounds for the arrest. They are as follows:

a) *Unsteadiness*- PC Aukum a testified that after handcuffing the defendant, she had be assisted into his vehicle. Having viewed the videotape which depicts her movements upon arriving at the sally port and entering the detachment, I find that the defendant was restricted in her ability to move due to the handcuffing itself. In other words, it was the Officer's actions in handcuffing her which lead to her "unsteadiness" as opposed to any pre-existing unsteadiness which may have arisen as a result of alcohol consumption. When I view her movement from the vehicle to the door of the sally port, there is absolutely nothing to suggest she was unsteady. In addition, when I view her walking in and out of the breath room, there is nothing untoward about her movement either. I find that it would be difficult

to step into a vehicle which is 8-10 inches off the ground, wearing sandals, while being handcuffed to the rear. If she was not handcuffed and exhibited unsteadiness, I may have come to a different conclusion on this issue.

b) *Weaving* - PC Aukuma maintained that the defendant moved from left to right while he escorted her and also while she walked from the breath room. With respect, I simply cannot accept this evidence. Having reviewed the videotape of her movement, I saw nothing to suggest she "weaved" while walking out of the breath room. What I did see was an obstruction, namely a garbage can which was in her path and her reaching down to place something in the garbage can. The videotape shows her fine motor skills, which in my view, were not indicative of somebody who was impaired by alcohol. In fact, the opposite is true. She's able to manoeuvre around a garbage can in a confined space without difficulty.

26 In the final analysis, while PC Aukum a may have had grounds to suspect that the defendant had alcohol in her bloodstream at the requisite time, which would have justified grounds to demand that she provide a sample of her breath into a screening device, he simply didn't have the objective grounds to form the opinion that her ability to drive was impaired by alcohol. PC Aukuma acknowledged in his evidence that he did not have a screening device on his person and couldn't have administered the test even if he wanted to. A statutory shortcut cannot justify strict requirements of the *Criminal Code*- even if an officer is not motivated by any bad faith. Here, there was no evidence of bad faith, but rather a circumstance where PC Aukuma jumped to the .conclusion that he had the requisite grounds, when in fact, he fell short of the required standard.

27 In light of my oral ruling, I inquired what the effect of it would be especially because the Crown was not proceeding on the Over 80 count and there was no "evidence" for me analyze under s.24(2) of the *Charter.* While the submission was framed as a s.8 violation, it was more properly analyzed as an issue under s.495(2) of the *Criminal Code.* The Crown advised me that they would not be calling any further evidence on the trial proper and likewise, Iwas advised that the defence would not be calling any further evidence either. I was to treat the evidence on the *voir dire* as part of the trial on its merits.

Conclusion

28 Having found that PC Aukum did not have reasonable and probable grounds to arrest the defendant, I found her not guilty of the offence of impaired operation.

29 In the circumstances, I find it unnecessary to fully address the s.7 and s.12 issues. Suffice to say, I am of the view that the onus is on the defendant to satisfy the Court of a *Charter* breach under either rubric and on the record before me, neither violation was made out. My tentative view is that the use of handcuffs at the roadside in the context of a drinking and driving offence is not an excessive use of force given the safety issues identified by PC Aukuma - in the circumstances of the case as described by him. Neither is the use of restraints analogous to the situation of restraining prisoners with handcuffs in the courtroom. There are different legal and policy considerations with respect to both scenarios, none of which I am required to resolve in these proceedings.

F. JAVED J.

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