R. v. Minor, [2020] O.J. No. 3061

Ontario Judgments

Ontario Court of Justice

C. Brewer J.

Heard: January 21, 2020.

Judgment: June 18, 2020.

Released: June 25, 2020.

Toronto Region Court File No.: 18-45003280

[2020] O.J. No. 3061

Between Her Majesty the Queen, and Kristen Minor

(31 paras.)

Counsel

Joaquin Canton, counsel for the Crown.

Michael Engel, counsel for the defendant, Kristen Minor.

Reasons for Judgment

C. BREWER J.

INTRODUCTION

1 Kristen Minor is charged with having care or control of a motor vehicle with a blood alcohol level above the legal limit on August 20, 2018. It is conceded that the defendant's blood alcohol concentration was between 175 and 220 milligrams of alcohol in 100 millilitres of blood at the time she was located in her vehicle by the police.

2 The primary issue for determination in this case is whether the Crown has proven beyond a reasonable doubt that Ms. Minor was in care or control of the vehicle at the time she was investigated by the police. In addition, Mr. Engel argues that the defendant was denied her right to be promptly informed of the reason for her detention and that she was arbitrarily detained by the police because she was handcuffed to a bench at the police station for four hours.

3 However, I find that there is no need to address the *Charter* issues raised by Mr. Engel, as I am not satisfied that the Crown has proven beyond a reasonable doubt that Ms. Minor was in care or control of her vehicle. My reasons for this conclusion are set out as follows.

THE EVIDENCE

A. THE CROWN'S CASE

4 Shortly before midnight on August 19, 2018, Constables Taylor and Campbell were responding to a radio call in the area of St. Clair Avenue and Bathurst Street. As they drove east on Maplewood Avenue towards Vaughan Road, the officers passed a silver Toyota properly parked on the side of the road. They heard the car's engine running. The driver's seat was reclined. Constables Taylor and Campbell exited their vehicle and approached the Toyota. They observed the defendant, asleep in the driver's seat. The car was in park, the keys were in the ignition and the dashboard was illuminated. The officers shone a light into the Toyota and knocked on the window several times before Ms. Minor awoke.

5 Once awakened, the defendant turned off the car and rolled down the window to speak with the police. Constable Taylor testified that he was concerned with the woman's well-being. He asked questions about how she was feeling and how she got to her current location. Ms. Minor appeared dazed and confused. She was not responsive to some questions and gave delayed answers to other queries. Ms. Minor seemed uncertain as to how she got to her current location, saying "maybe an Uber brought her". Some of the defendant's responses seemed illogical to the officers. For example, they could not understand why her car was parked in a residential area, neither near Queen Street, where she had been, nor near Mississauga, where she was going. They also were perplexed by the defendant's choice to use an Uber when she had a car available to her. After speaking to Ms. Minor for about a minute, Constable Taylor turned on the in-car camera. They talked for another four minutes while the officer developed grounds for making a roadside screening demand. The officer ordered an approved screening device at 12:05 a.m.

6 In response to police questions, Ms. Minor admitted that she had one or two drinks about an hour earlier. Constable Taylor noted a light odour of alcohol on her breath, although Constable Campbell did not notice any smell of alcohol. A demand was made for a roadside breath sample. Ms. Minor left the car and walked to the police car without difficulty when the screening device arrived at 12:11 a.m. After her breath sample registered a 'fail' on the approved screening device, Ms. Minor was arrested and advised of her right to counsel. Constable Campbell went to the defendant's car, where she retrieved the keys and obtained Ms. Minor's phone and bank card.

B. THE DEFENCE EVIDENCE

7 At the time of these events, Ms. Minor was self-employed and working on contract as an insurance adjuster in Toronto. She had been in the city for about three months and had been staying in various Air B&B locations. The defendant had been in her current residence in Mississauga for a few days. The car she was driving was a rental vehicle.

8 On August 19, 2018, Ms. Minor made arrangements to have dinner with a friend on St. Clair Avenue West, a few blocks from the residential area where she parked her car. However, the friend did not show

up. Ms. Minor decided to go downtown to a restaurant she knew on Queen Street, called Nana. The defendant was concerned about parking downtown and decided to leave her car where it was and take an Uber to the restaurant. At that time, her intention was to take an Uber back to her car after dinner and to drive to Mississauga.

9 Ms. Minor had dinner and a few drinks at Nana. The defendant walked along Queen Street and had a few more drinks. Eventually Ms. Minor called an Uber and returned to the place on St. Clair where she had originally arranged to meet her friend. Around that time her phone died. The defendant realized that she was in no condition to drive. However, Ms. Minor needed to charge her phone, as she did not recall the exact address where she was staying, and she needed to call an Uber to take her there. In addition, the defendant had left the keys to her Air B&B in her car.

10 It took Ms. Minor some time to locate her vehicle, as she did not recall the address where it had been parked. Her plan was to charge her phone and get an Uber to take her to Mississauga. She intended to take another Uber to work in the morning and then ask a colleague to drive her to pick up her car after work the next day.

11 Upon finding her car, Ms. Minor plugged in her phone and turned on the car to charge it. Her telephone was an older model that would not function as soon as it was connected to a power source. While waiting for the phone to charge, Ms. Minor reclined the driver's seat and fell asleep. She had no intention of driving again that night. Ms. Minor had no idea how long she had been asleep when the police woke her.

12 The defendant testified that she could not have accidentally set her car in motion, as it would require applying the brake and putting the gear shift in the drive position.

THE FUNDAMENTAL PRINCIPLES

13 In this case, the defendant is presumed to be innocent, unless and until the Crown has proven each essential element of this offence beyond a reasonable doubt.

14 Reasonable doubt is based upon reason and common sense. It is logically connected to the evidence or the lack of evidence. It is not enough for me to believe that Ms. Minor is possibly or even probably guilty. Reasonable doubt requires more. As a standard, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities. At the same time, reasonable doubt does not require proof beyond all doubt, nor is it proof to an absolute certainty.

15 In assessing the credibility of the witnesses in this case, I remind myself of the principles articulated by the Supreme Court of Canada in *R. v. D.W. (1991), 63 C.C.C. (3d) 397*.

ANALYSIS

16 Section 253 of the *Criminal Code* reads as follows:

> 253(1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

17 The *mens rea* for having care or control of a motor vehicle is the intent to assume care or control after the voluntary consumption of alcohol or a drug. The *actus reus* is the act of assuming care or control of a vehicle when the voluntary consumption of alcohol or a drug has resulted in an illegal blood alcohol concentration or has impaired the ability to drive.[1] Care or control involves an intentional course of conduct associated with a motor vehicle.

18 The Crown is entitled to prove the essential element of care or control of a motor vehicle by any of three means. The first method is by establishing actual driving by the defendant, while impaired or "over 80". The second means is by relying on the rebuttable presumption in section 258(1)(a) of the *Criminal Code*, by showing that the defendant was occupying the driver's seat of the car. The third method is by proving actual or *de facto* care or control of the automobile by establishing that there existed a realistic risk of danger in the circumstances.[2]

19 Mr. Canton relies on the second and third routes to establishing care or control.

A. THE REBUTTABLE PRESUMPTION

20 Section 258(1)(a) of the *Criminal Code* creates an evidentiary shortcut for prosecutors by providing that, where a defendant is found in the driver's seat of a vehicle, it can be presumed that he or she was in care or control of that vehicle. Since Ms. Minor was found asleep behind the wheel of her car, she is presumed to have been in care or control of that automobile. Ms. Minor can rebut the presumption by establishing, on a balance of probabilities that she did not occupy the driver's seat for the purpose of setting the vehicle in motion.

21 As Code J. noted in *R. v. Tharumakulasingham*, *2016 ONSC 2008* at para 8:

> The relevant time frame for any rebutting evidence concerning an accused's intention to drive is the point when the accused entered the driver's seat, that is, he "must show that his occupancy began without the purpose of setting the vehicle in motion" [emphasis added]. See: *R. v. Hatfield (1997), 115 C.C.C. (3d) 47* (Ont. C.A.). Given that the Appellant had clearly been driving the car immediately before the accident, and had therefore initially taken up his position in the driver's seat for that purpose, the only way to rebut the presumption in this case was to prove that his intention to drive had changed after the accident and before the police arrived at the scene and found him still sitting in the driver's seat with the engine running and with the lights on. See: *R. v. Wren (2000), 144 C.C.C.(3d) 374* (Ont. C.A.); *R. v. Milne*, *2012 ONSC 5779* at para. 23.

22 Here, Ms. Minor testified that she had no intention to drive when she entered her car after returning from Queen Street. She maintained that her sole purpose in getting in the driver's seat was to turn on the car in order to charge her phone, which would permit her to ascertain the exact address of her B&B and to call

for a ride there from Uber. The defendant's version of events receives some support from the fact that Constable Campbell located Ms. Minor's phone in the front seat of the car, outside of its case.

23 Ms. Minor provided a coherent account of her actions that night, which was not shaken in cross-examination. She candidly acknowledged that her initial plan, before going to Nana, was to take an Uber back to her car and drive to her B&B. However, she jettisoned that idea after she began drinking. It was her intention at the time she entered the car to take an Uber home after charging her phone. There is no evidence that she changed her mind at any time prior to her arrest.

24 Assessed in the context of the evidence as a whole, I am satisfied that Ms. Minor has rebutted the presumption in s.258(1)(a). I accept that she entered the car, after eating and drinking on Queen Street, to charge her phone and not to drive the automobile or put it in motion.

B. *DE FACTO* CARE OR CONTROL

25 A defendant who has rebutted the presumption of car or control may still be convicted where the Crown proves, beyond a reasonable doubt, acts by the defendant that involve some use of the motor vehicle or its fittings or equipment, or some course of conduct associated with the vehicle that would involve a realistic risk of endangering the public.[3] As the Supreme Court of Canada stated in *R. v. Boudreault, supra* at para 42:

> In the absence of a contemporaneous intention to drive, a realistic risk of danger may arise in at least three ways. First, an inebriated person who initially does not intend to drive may later, while still impaired, change his or her mind and proceed to do so; second, an inebriated person behind the wheel may unintentionally set the vehicle in motion; and third, through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property.

26 The risk of danger must be realistic and not just theoretically possible. However, it need not be probable, serious or even substantial.[4] A determination of a realistic risk of danger is a finding of fact that must be assessed on a "low threshold".[5] A trial judge must examine all of the relevant evidence and consider all factors present.[6] In the absence of evidence to the contrary, a realistic risk of danger will normally be the only reasonable inference where the Crown establishes impairment and a present ability to set the vehicle in motion. To avoid conviction, the defendant will in practice face a tactical necessity of adducing credible and reliable evidence tending to prove that no realistic risk of danger existed in the particular circumstances of the case.[7]

27 In *R. v. Szymanski, supra*, at para 93, Durno J. provided a helpful list of factors that a court may consider when engaging in a risk of danger analysis on the basis of circumstantial evidence. The factors, as applied to this case, are as follows:

a) *The level of impairment, which is relevant to the likelihood of exercising bad judgment and the time it would take for the accused to become fit to drive*: Although she showed few indicia of alcohol consumption, Ms. Minor's blood alcohol concentration at the time she was investigated by the police was very high -- between 175 and 220 milligrams of alcohol in

100 millilitres of blood. In my opinion, it would have taken a long time for her to sober up and make a rational decision to drive.

However, it is significant that Ms. Minor was deeply asleep at the time she was investigated. This is not a situation where the defendant was waiting to sober up in her car. Instead, Ms. Minor was fast asleep and only roused by significant effort on the part of the police. As my colleague, Javed J. commented in *R. v. Goodwin*, *2017 ONCJ 301* at para 71, in similar circumstances: she "couldn't exercise any judgment at all because [s]he was passed out."

b) *Whether the keys were in the ignition or readily available*: Here, the keys were in the ignition, albeit only for the purpose of powering the vehicle so the phone could charge.

c) *Whether the vehicle was running*: The officers heard the engine running and saw the lights on the dashboard.

d) *The location of the vehicle*: The car was properly parked at the curb. It was not blocking traffic or in a live lane of traffic or on the side of a highway. The vehicle was not in a position to endanger anyone.

e) *Whether the accused had reached his or her destination or was still required to travel to get to the destination*: Ms. Minor had not reached her destination.

f) *The accused's disposition and attitude*: Ms. Minor was found in a deep sleep. Upon awaking, she was somewhat confused but cooperative with the officers.

g) *Whether the accused drove the vehicle to the location of drinking*: Ms. Minor did not drive the car to Nana; she took an Uber downtown.

h) *Whether the accused started driving after drinking and pulled over to "sleep it off" or started using the vehicle for purposes other than driving*: I am satisfied that Ms. Minor did not drive after drinking. I accept that she fell asleep after occupying the driver's seat solely to charge her cell phone. The defendant used the vehicle only for a purpose other than driving.

i) *Whether the accused had a plan to get home that did not involve driving while impaired or over the legal limit*: I accept Ms. Minor's evidence that she intended to take an Uber to her B&B once her phone had charged.

j) *Whether the accused had a stated intention to resume driving*: I believe Ms. Minor's testimony that she had no intention of driving after she consumed alcohol. Not only did she intend to call an Uber once the phone had charged, the defendant had already formulated a plan to retrieve the car after work the following day with help from a colleague. Instead, she fell asleep while her phone was charging.

k) *Whether the accused was seated in the driver's seat, regardless of the applicability of the presumption*: Ms. Minor was in the driver's seat of the automobile.

l) *Whether the accused was wearing his or her seatbelt*: There is no direct evidence on whether Ms. Minor was wearing her seatbelt. However, given the degree to which the seat was reclined, it appears likely that she was not wearing one.

m) *Whether the accused failed to take advantage of alternate means of leaving the scene*: There is evidence that Ms. Minor intended to use another means of leaving the scene once her phone was charged, but she fell asleep instead.

n) *Whether the accused had a cell phone with which to make other arrangements and failed to do so*: I accept that the battery in Ms. Minor's cell phone had died.

28 In all of the circumstances, I am not satisfied that care or control has been proven beyond a reasonable doubt. The risk envisioned by the Supreme Court in *Boudreault* is one that is real and realistic, not just theoretically possible. In its judgment, the court provided examples of situations where an acquittal would be warranted as there was no realistic risk of danger. Among those examples was "use of the vehicle for a manifestly innocent purpose".[8] I have found as a fact that Ms. Minor entered her car *only* because her cell phone had died and she needed to charge her phone. She occupied the driver's seat and activated the engine for the sole purpose of charging her phone -- which, in my view, was an innocent purpose.

29 There is no evidence to suggest that Ms. Minor would have changed her mind and abandoned her plan to call an Uber when she awoke. In her testimony, the defendant denied any such possibility. Nothing in her interaction with the police suggests otherwise. Indeed, her first action on waking was to turn off the car before rolling down the window to speak with the two constables.

30 Ms. Minor was deeply asleep with the driver's seat fully reclined when approached by the police. There is nothing in the evidence of the officers to suggest that the defendant's conduct in relation to the car while asleep created a dangerous situation. It would be speculative to believe that Ms. Minor's body could have unintentionally affected the fittings of the car so as to present a realistic risk of danger. In order for the vehicle to move, the brake would need to be depressed at the same time that the car was put in gear.

CONCLUSION

31 For these reasons, an acquittal is entered.

C. BREWER J.

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1 *R. v. Toews*, *[1985] 2 S.C.R. 119*

2 See, for example, *R. v. Szymanski*, *[2009] O.J. No 3623* (S.C.J.) at para 29

3 *R. v. Toews, supra*; *R. v. Wren, supra; R. v. Boudreault*, *2012 SCC 56*

4 *R. v. Boudreault, supra* at paras 34-35

5 *Ibid* at paras 35 and 48

6 See *R. v. Szymanski, supra* at para 93; *R. v. Smits*, *[2012] O.J. No. 3629* (C.A.) at paras 60-65.

7 *R. v. Boudreault, supra* at para 48

8 *R. v. Boudreault, supra* at para 49