



**R. v. Prado, [2016] O.J. No. 7211**

Ontario Judgments

Ontario Court of Justice

N. Dwyer J.

Heard: December 7 and 9, 2016.

Judgment: December 14, 2016.

Newmarket Court File No.: 4911-998-15-05915-00

***[2016] O.J. No. 7211***

Between Her Majesty the Queen, And Hector Prado

(24 paras.)

***Counsel***

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Lucas O'Neil, counsel for the Crown.

Michael Engel, counsel for the defendant Hector Prado.

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***Reasons for Judgment***

***N. DWYER J.***

**1** Mr. Prado is charged with operate motor vehicle impaired and operate motor vehicle over 80 contrary to Sections 253(1)(a) and (b) of the *Criminal Code*. The investigation of Mr. Prado arose from citizen complaints of extremely erratic driving on Hwy. 404 at about 3:00 a.m. on July 15, 2015. The information was broadcast by dispatch and received by P.C. Jordan Meffe and P.C. Craig Dundas who were both patrolling in separate police vehicles. Both responded to the broadcast by attending the residence of the registered owner of the vehicle identified in the civilian complaint. Mr. Prado raises the issue of reasonable and probable grounds for arrest and the approved instrument demand as a result of the investigation just outside of his house. Section 10 *Charter* issues also have been raised.

**2** The Crown has conceded the impaired count. The trial proceeded as a blended hearing.

***The Evidence***

***PC Meffe***

Michael Engel

3 He responded to a dispatch broadcast at 2:59 a.m. The broadcast was an assist other agency call originating from the Ontario Provincial Police and the Toronto Police Service. The information was that a civilian complainant had described an impaired driver, operating a white Mazda CSX motor vehicle, license plate number BFEW240, at Hwy. 404 and Hwy. 7. The Mazda was described as being driven at a high rate of speed, erratically, and all over the road, to the point of nearly hitting 30 vehicles. P.C. Meffe was in the Weston Road and Rutherford area when he heard the broadcast. He responded by checking the PARIS system for the address of the registered owner of the Mazda, and driving to that address which was 5 Moderna Drive. Upon arrival at that address at 3:03 a.m. he did not see the Mazda in the driveway and simply waited. Another officer, P.C. Dundas, had also arrived in a separate vehicle and likewise waited for the anticipated arrival of the Mazda.

### *The Factors*

4 P.C. Meffe testified that the arrival of the Mazda was first announced by loud music followed by the car driving fast around the intersection of Moderna and Davos Road. All that can be said is that the Mazda was driven quickly around the intersection. P.C. Meffe and P.C. Dundas flagged down the vehicle. The vehicle stopped in the middle of the road. Mr. Prado, the driver, was asked to turn off his vehicle. He produced his licence which confirmed his identity. Mr. Prado exited his vehicle. P.C. Meffe asked Mr. Prado to walk to the back of his car so that he could observe him walking. During this brief interaction, from the Mazda pulling up, to the brief conversation, to the walk to the back of the car, P.C. Meffe made the following further observations and learned the following information:

1. Mr. Prado walked in a slow and cautious manner to the back of the car which was only a few steps.
2. P.C. Meffe smelled the odour of alcohol on Mr. Prado's breath when he exited the car and spoke to the officer.
3. His eyes were red and bloodshot.
4. When Mr. Prado stood upright he swayed gently from left to right.
5. His last drink was 2 hours before, when he had 2 glasses of Ricard's Red Beer.
6. His face was flush.
7. He was perspiring on his forehead.
8. He had a long gaze, and did not direct it at either officer.
9. He was repeatedly licking his lips like he was dehydrated.
10. When asked for documents he had trouble finding them.

5 The above factors, in combination with the information from the dispatch, formed the grounds for an arrest for impaired driving at 3:16 a.m. He was placed in the back of the cruiser. Mr. Prado was given his right to counsel at 3:19 a.m., and cautioned at 3:20 a.m. He stated that he wished to get counsel and requested Duty Counsel. Mr. Prado was taken from the scene at 3:21 a.m., arrived at the station at 3:29 a.m. and was paraded at 3:35 a.m.

6 On cross-examination P.C. Meffe stated the following:

1. The complainant on the 911 call was not available despite numerous attempts to contact him.
2. There was no information about how long the Mazda was followed by the complainant.
3. The Mazda traveled a very short distance, from the time it was first observed, to the point where it stopped on the street in front of Mr. Prado's residence. This took a matter of seconds. Further the police cars on scene were blocking the driveway.
4. When Mr. Prado was flagged down he had no choice but to comply with the request to stop and get out of his car. The stop was for investigative purposes based on the broadcast by dispatch and the vehicle matching the description.
5. Though P.C. Meffe testified that he smelled an odour of alcohol when Mr. Prado exited the vehicle, this was not written in his notebook. There was a notebook entry of a strong odour of alcohol in the cruiser once Mr. Prado was placed there.
6. He did not tell Mr. Prado of the reason for the police presence. However he knew that it was a criminal investigation.
7. The grounds to arrest for impaired crystallized from 3:09 a.m. to 3:16 a.m. as he stood with Mr. Prado.
8. There was no slurring of speech.
9. He indicated that Mr. Prado was swaying as he sat in the cruiser after his arrest. I have looked very carefully at the in-car video and do not see any evidence of swaying. I have also looked very carefully at the booking-in video and have drawn the same conclusion; I do not see any swaying.

***Constable Craig Dundas***

7 P.C. Dundas was the second officer on scene. He testified as follows:

1. That he heard the Mazda before he saw it come quickly around the corner and stop on the street outside Moderna Drive.
2. He observed Mr. Prado sway slightly as he exited the Mazda.
3. He explained the reason for the stop to Mr. Prado.
4. He noticed the odour of alcohol on Mr. Prado's breath.
5. He did not have a note that Mr. Prado had admitted to drinking.

***Constable Jason Hammond***

8 P.C. Hammond was the breath technician. Mr. Prado was turned over to him at 4:00 a.m. Of interest is his evidence that Mr. Prado was swaying or unsteady on his feet in the breath room. Once again I have reviewed the breath room video and do not see any evidence of swaying. P.C. Hammond also testified that

Mr. Prado had slurred speech. This is contrary to the evidence of the other officers who do not mention slurring.

### ***Hector Prado***

**9** Mr. Prado testified that his drive home was normal. He testified that he arrived home to find the police on his property shining lights into his house and looking in. He was not told why he was being investigated and felt compelled to follow their direction. This testimony was only on the *Charter* issue.

### ***Factual Findings***

**10** Prior to outlining and dealing with the issues in this case, I wish to address a few factual issues that have arisen in this case.

**11** Firstly the contents and source of the dispatch broadcast must be assessed. The source of the information was a complainant who did not testify at the trial. The information that was provided came through the Ontario Provincial Police, The Toronto Police Service and The York Regional Police. The information was of a motor vehicle that almost caused 30 collisions, traveling erratically, all over the road and at a high rate of speed. The vehicle had been identified by a licence plate number, make and model. Beyond that there was no description of the driver or other details, such as the length of the time the vehicle was followed. The vehicle that turned onto Moderna drove fast around the corner according to Officers Meffe and Dundas. The vehicle stopped in the road and not his driveway, because the police cars were in the way and Mr. Prado was flagged down. Mr. Prado testified that he was shocked that police were by his house. His immediate thought was that something had happened to his family inside. His evidence in this regard is credible. The driving and Mr. Prado's actions were not consistent with the description from the dispatch, or what might have been expected given the dispatch information.

**12** Secondly, P.C. Meffe's testimony that he smelled alcohol on the breath of Mr. Prado outside, prior to arresting him, is also questioned by the defence, on the basis that there is no note of this admittedly important observation. P.C. Meffe testified that from the start he knew that this was a drinking and driving investigation. The defence argues that one would have expected to see this noted in the officer's memo book. There was a reference by P.C. Meffe in his memo book to smelling an odour of alcohol, but this referred to a time after the arrest when Mr. Prado was in the cruiser. The defence refers to *R. v. Zack*, [\[1999\] O.J. No. 5747](#) which states at paragraph 6:

**6** It is common ground that it is Jackson's grounds that must be assessed and they must be assessed subjectively and objectively. With respect to the question of credibility, it is my view that I cannot accept on a balance of probability that the accused actually did present herself as unsteady on her feet and confused to Jackson. The failure to note these observations is a serious omission and, as I have noted to counsel, it cannot be accepted. If it was ever an acceptable explanation, in this day of full disclosure it cannot be an acceptable explanation for a police officer to say 'I did not note it because I would remember it'. It is necessary for the officer to at least somewhere, maybe not necessarily in his notebook, put the significant observations that he made. In my view, the absence of the questioned observations in his notebook lead to the conclusion that those observations were not, in fact, made at the time but are perhaps something that over the course of time the officer has

come to believe that he saw. I cannot accept, on the balance of probabilities, that those observations were made.

**13** Although it is surprising that this very important information is not noted, P.C. Meffe's assertion is supported by P.C. Dundas, who testified that he smelled an odour of alcohol from Mr. Prado's breath, outside, prior to the arrest. I find that not making a note might have been an oversight by P.C. Meffe.

**14** Thirdly, the defence questions that Mr. Prado was told the reason he was being investigated. P.C. Meffe testified that he did not explain the reason to Mr. Prado but that Mr. Prado knew that it was a criminal investigation. P.C. Dundas testified that he told Mr. Prado the reason for the investigation. Mr. Prado testified that he was not told why he was being investigated and only learned the answer when he was arrested. It is difficult to reconcile the testimony of Mr. Prado and P.C. Dundas on this point. P.C. Meffe did not say that he heard the explanation being given by P.C. Dundas. It is quite possible that an explanation was given, and that in the stress of the time it was not properly conveyed to Mr. Prado. Had an explanation been clearly stated P.C. Meffe would likely have recalled it or made a note of it.

**15** Fourthly, I must consider the evidence that Mr. Prado was swaying on the roadside. I do not accept this evidence from any of the officers. I have looked carefully at the video exhibits that show Mr. Prado in the cruiser, at the booking-in and in the breath room. Mr. Prado is at all times physically composed while standing or sitting. I did not observe any type of sway. There was no video of the interaction outside of the cruiser, on scene. However I do not accept that there was any swaying at this time given the proximity in time of the video evidence I have seen. In this regard see *R. v. Singh*, [\[1997\] O.J. No. 1164](#) at para. 7:

**6** In this case we have a video which lasts about a half an hour, showing the Appellant throughout that half hour. During that half hour he is seen standing for fairly lengthy periods of time, he is seen walking, he is seen turning, he is seen reaching into his pocket, taking things out of his pocket, putting things in his pocket, signing documents. In none of the observations that can be made on the video is there any of the traditional indicia of impairment. That is, there is no observations that would suggest that his actions were consistent with being impaired.

**7** The driving is terrible. It may even be worse than terrible. The question is can the driving of a person who has been drinking of itself be evidence upon which the conviction can be supported almost totally.

**16** Further I do not consider the slow deliberate walk to the cruiser, described by P.C. Meffe, to be significant given that it was of short duration and only a few steps.

### **Issues**

1. Did P.C. Meffe have reasonable and probable grounds to arrest Mr Prado for impaired operation?
2. Did P.C. Meffe have reasonable grounds to make a breath demand?
3. Was there a breach of Mr. Prado's *Charter* Section 8 rights due to the absence of reasonable grounds for his arrest and the breath demand?

4. Was there a breach of Mr. Prado's right to be informed promptly of the reason for his detention in breach of his *Charter* Section 10(a) rights?
5. Can the incriminating statements and observational evidence attributed to Mr. Prado at the roadside, prior to his arrest and the administration of his right to counsel, be used substantively or only in relation to the establishment of reasonable grounds?
6. Was there compulsion of Mr. Prado at the roadside leading to the collection of incriminating evidence and if yes, is this evidence admissible for any purpose?

### ***Reasonable and Probable Grounds (Issues 1, 2, and 3)***

**17** The central issue in this case is whether or not P.C. Meffe had reasonable grounds to arrest Mr. Prado and to make the breathalyzer demand. To lawfully arrest for impaired driving and make a lawful breathalyzer demand one has to consider the meaning of impairment. In *R. v. Stellato*, [\[1993\] O.J. No. 18](#) (C.A.) the court stated at paragraph 14:

**14** In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

**18** See also *R. v. Bush*, [\[2010\] O.J. No. 3453](#) (CA) para. 47. To lawfully make a demand for a breath sample, Section 254(3) requires the officer to have "reasonable and probable grounds to believe." In *R. v. Bush* at para. 38:

**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.

**19** On a review of the grounds present, given my review of the evidence, I find that P.C. Meffe did not have the required reasonable and probable grounds to arrest for impaired operation, or reasonable grounds to believe, to justify a breath demand. I find that the grounds were not objectively reasonable, in spite of the officer's subjective belief. The observations of the officers did not match the dispatch report. The reported swaying that figured prominently in the grounds simply was not present. There was an odor of alcohol and bloodshot eyes but no unsteadiness, slurred speech or other signs. There was a breach of Mr. Prado's Section 8 *Charter* right.

**20** It is clear that the officers had reasonable suspicion. They failed to act on this and instead went beyond what the observations and information received could sustain.

***Breach of Right to Counsel and Compulsion (Issues 4, 5 and 6)***

**21** The right to counsel argument in this case arises from events at the scene when Mr. Prado drove up. The defence argues that Mr. Prado was immediately detained, but was not informed promptly of the reason as required by Section 10(a) of the *Charter*. This led to Mr. Prado not being aware of his jeopardy. In this case the Crown has conceded that Mr. Prado was detained and was entitled to be advised of the reason for his detention; see *R. v. Orbanski*, [\[2005\] S.C.J. No. 37](#). The defence further contends that Mr. Prado was then compelled to do things and answer questions without being aware of his jeopardy. On this point I find the evidence of P.C. Dundas to be compelling that he advised of the reason for the investigation, though I am not convinced that this message registered with Mr. Prado. There was no evidence from P.C. Dundas about any discussion with Mr. Prado about this information, or any evidence of acknowledgement that Mr. Prado was aware. In the circumstances I find that there was a breach of Section 10(b). I find however that there was no bad faith in this regard.

***Section 24(2)***

**22** I will now consider whether the breathalyzer examination results should be excluded. I must consider the test in *R. v. Grant*, [\[2009\] 2 SCR 353](#). First I consider the Section 8 breach to be serious. The officers appear to have failed to carefully consider their own observations of Mr. Prado on the scene. His actions fell far short of the reasonable ground threshold. The officers clearly could have justified a roadside test but did not do so. The beach had a great impact on the right not to be subject to unreasonable search given the nature of the detention required and the breathalyzer test. Mr. Prado was arrested in front of his home in the early morning hours and was taken to a police station when a roadside test could have been employed. Clearly society does have an interest in seeing this case and others like it being adjudicated on its merits. This factor weighs in favour of not excluding the evidence. Dealing briefly with the Section 10(a) breach, I have a different view. There was no bad faith and much of the evidence that the defence arose from this breach would have been present without the breach. On detention, in the circumstances, it is inevitable that Mr. Prado would have been observed walking, though his answers to questions might have been different.

**23** On assessing and balancing all of the factors I have concluded that the evidence from the breathalyzer examination should be excluded.

**24** In the result the charges are dismissed.

N. DWYER J.