R. v. Burton, [2015] O.J. No. 7319

Ontario Judgments

Ontario Court of Justice

J.F. Adamson J.

Heard: May 11, 2015.

Oral judgment: May 11, 2015.

[2015] O.J. No. 7319

Between Her Majesty the Queen, and Michael Burton

(58 paras.)

Counsel

No counsel mentioned.

REASONS FOR JUDGMENT

J.F. ADAMSON J. (orally)

1 These oral reasons are given today, and they will cover the complete range of arguments raised by Mr. Engel.

2 Michael Burton stands charged with exceed .08 resulting from an incident on October 8th, 2013 when he was stopped in a ride program, failed an ASD, and subsequently gave two breath samples with truncated readings of 110 mg each.

3 Most of the trial was heard on December 1st, 2014 when the Crown's case went in through Constables Cox and Ritchie of the Whitby OPP. The trial concluded on April 13th, 2015 when the defence called its only witness, toxicologist Ben Joseph.

4 The following issues were raised.

1. Whether the presumption in Section 258(1)(c) can apply when the officer has failed to specify the wording of the either the screening device or intoxilyzer demands.
2. Two, whether the same presumption does not apply because the tests were not taken as soon as practicable.

3. Three, whether the same presumption does not apply because the defence has raised a reasonable doubt as to the accuracy of the instrument, the Intoxilyzer 8000C itself. The issue can alternatively be framed as to whether the defence has raised evidence to the contrary within the meaning of that section.
4. Whether Mr. Burton's Section 8 rights were infringed because Constable Cox did not have reasonable and probable grounds for the Section 254(3) demand based on the following.
   (a) His failure to inquire as to the presence of mouth alcohol or whether Mr. Burton had been smoking in the 15 minutes immediately before the ASD test was administered.
   (b) The fact that the officer, PC Ritchie, who calibrated the ASD, used the numerals 100 and 101, rather than .100 and .101 when he described that procedure.
   (c) The fact that PC Ritchie did not note the temperature of the alcohol standard as recorded on an external thermometer when he calibrated the instrument.
   (d) Constable Cox relied on the self-test that he conducted on the ASD at the start of his shift, some six hours earlier, rather than conducting a new self-test immediately before the test on Mr. Burton.
   (e) That PC Cox thought the ASD was calibrated to record a fail at readings in excess of 80 mg, when in fact it is set at 100 mg.
   (f) That PC Cox did not know or understand the various signals the ASD emits as it becomes ready to receive a test sample.

5 Lastly, if I include that a breach has occurred, should the evidence of the resulting breath test be excluded pursuant to Section 24(2) of the Canadian Charter of Rights and Freedoms.

The Facts

6 PC Cox testified that he stopped Mr. Burton as part of a Ride Program just after midnight on the 8th of October 2013. He detected a strong odour of alcohol during their brief conversation, but saw no signs of impairment. Mr. Burton told PC Cox that he had consumed two beers during the evening. Based on the above PC Cox demanded that Mr. Burton provide a sample of his breath to be tested by an approved screening device.

7 PC Cox was not asked by either counsel to recite the demand. He testified that he read it off a card, but did not have the card with him, as it was his first day back from five months off for double knee surgery. In any event Mr. Burton complied with the demand as read and blew a fail. PC Cox took this to mean that Mr. Burton's blood alcohol content exceeded 80 mg of alcohol in 100 ml of blood. In this he was wrong, as PC Ritchie testified that the ASD was actually calibrated to record a fail only when the blood alcohol content exceeded 100 mg.

8 Otherwise PC Cox believed this ASD to be in proper working order because he had tested it at 6:04 p.m. on October 7th, he knew it had been calibrated by PC Ritchie, known to him to be a qualified breathalyser technician the day before, and its green light came on after he turned it on, which indicted to him that it was ready to receive a sample.

9 PC Cox had trained on this type of device while in Police College and had used it over the years since. He seemed confident that he knew how to use it. Cross-examination revealed some gaps in this knowledge.

10 He was unaware of any requirement of proximity with respect to his self-test. Also when questioned about what he would expect to see when he turned the ASD on, he said he would just see the letters "GLC". He did not recall the yellow light coming on as should happen according to both the instrument's manual and the expert evidence that I heard.

11 The same sources indicated some other letters and numerals should be displayed. The officer said he did not see them, wasn't looking for them, and did not know he was supposed to. He did remember that a green light should come on, and said it did, but did not know if it came on after 30 seconds as it should.

12 The manual and the expert also indicated that a short tone will sound to signal that the instrument is ready. PC Cox said there was no such tone.

13 Following his arrest Mr. Burton was given his rights to counsel and the caution, and an intoxilyzer demand followed at 1:26 a.m. The description of this demand had the same limitations as the first.

14 Mr. Burton was transported to the OPP station, which is within site of the arrest location, arriving at 1:29 a.m. He was searched, his property was dealt with, and he was lodged in cell number one.

15 At 1:46 PC Cox called duty counsel as requested by Mr. Burton, and a lawyer returned the call at 1:54. At that point Mr. Burton was placed in a private room for the phone call which lasted until 2:00 a.m., when he was turned over to PC Ritchie for the breath test.

16 PC Cox also gave PC Ritchie his grounds, which included the fail on the ASD. Mr. Burton was returned to PC Cox at 2:33, and the appropriate paperwork was completed with Mr. Burton being released at 3:26 a.m. on a promise to appear.

17 I also heard evidence from PC Ritchie, a qualified intoxilyzer technician. He had also been part of the Ride Team. He went to the station as soon as he was advised by PC Cox that a test would be necessary. This was at 1:18 a.m.

18 The instrument was already turned on, but PC Ritchie commenced to make it ready to conduct a test. This involved its self-diagnostic check plus his calibration check and the self-test. The machine was ready at 1:34.

19 PC Ritchie conceded under cross-examination that he could have done some of this testing before going out to the Ride Program.

20 PC Ritchie also testified that it was he who calibrated the ASD the day before as stated. His evidence was that he calibrated to a value of 100 as displayed on the instrument, and was fully aware that the decimal point may show in front or behind depending on the instrument. His evidence made it abundantly clear that he was aware that blood alcohol content can be expressed in either mg per 100 ml of blood, or grams per

100 ml of blood, resulting in different placements of the decimal point. The difference is apparently between Canadian and American styles of numeration.

21 He also described that the calibration is achieved through the use of an external standard which is warmed in a simulator to a certain temperature. He conceded that he failed to note down that temperature. He was not questioned as to what the temperature should be, or whether the simulator was actually warmed to that temperature. He conceded that it is a vital aspect of the calibration, and that he usually records it in his notes. The evidence did not establish that an incorrect temperature was used, only that the temperature was not noted.

22 Mr. Ben Joseph reiterated this when he testified for the defence. He opined that the temperature of the external standard was a vital aspect of calibration. His opinion was that he could not verify the accuracy of the calibration without this information. He also testified generally about the need for accurate record keeping of all procedures concerning both the ASD and the intoxilyzer instruments. He gave examples for the Intoxilyzer 8000C as malfunction catastrophically, even where all records and all its self-diagnostic functions would suggest that all was well.

23 In respect of this particular instrument, he pointed to a single deficiency. In addition to the instrument's internal thermometers there is a reference thermometer, NIST, that operates as part of the calibration process. He found that this thermometer was last calibrated in November of 2011, and that this was "at the very least outside of the guidelines".

24 Under cross-examination he conceded that he couldn't say the instrument wasn't properly maintained, he just couldn't say that it was. This was the basis for his conclusion, that the instrument was not operated properly, and that there was a "strong likelihood that its results aren't reliable".

25 In addition Mr. Joseph's evidence underlined PC Cox's deficiencies in operation the ASD. He specifically mentioned that a self-test of an ASD 6 h hours earlier was inadequate, and that a such a self-test should be done just prior to the test. He also said that there should be an inquiry to determine if the subject had recently smoked, or if there was a possibility of mouth alcohol through the preceding 15 minutes.

26 Turning now to the issues.

Issue one, the wording of the demand.

27 The defence argues that the officer's evidence on the wording of the demand is insufficient for the purposes of Section 254(3). The law is clear that no particular formulation of the demand is required. The Superior Court in R. v. Ghebretatiyos, *[2000] O.J. No. 4982*, at paragraphs 17 to 20, has instructed me that a flexible and functional approach to the issue is required. I must focus on whether the driver understood the demands, the requirements and their consequences should he refuse to comply and then determine whether they were lawful.

28 On the evidence before me Mr. Burton appeared to have no difficulty in understanding the demands, and indicated as much in answer to the officer's questions. The officer explained why he did not have his card with him on the day of the trial, that he did not attempt to recite the demand without his card, was

because neither counsel asked him to. He was able to distinguish between the two different demands that he had given, both in his evidence and to Mr. Burton at the time. I am left with no doubt that the intoxilyzer and ASD demands were both worded in a lawful fashion.

Issue two, as soon as practicable.

29 The defence contends that the tests were not taken as soon as practicable and complains of the following time periods as being ill-explained or not explained. The 17 minutes from the arrival at the station until the call to duty counsel at 1:46. The eight minute wait for a call back, from 1:46 to 1:54. The six minute delay from 2:00 a.m. to 2:06, when the first test was taken. The 23 minutes between the tests when only 17 were required, thus delaying matters a further six minutes.

30 It is the position of the defence that the officer's explanation of the first 17 minutes at the station being spent searching the accused and lodging his person and his property is inadequate. I disagree. This process is commonly known as the booking process, and a period of approximately 15 minutes is to be expected for what must transpire. It is also reasonable for police stations to require that the booking process be completed before any interruptions take place. This process safeguards both the accused and his property, and the integrity of police records. Unless the officer is aware that there will be a long wait for a call back, it is eminently sensible to complete the booking before making the call to duty counsel. Here the call was returned in eight minutes. I find both these time periods to be adequately explained.

31 It was argued that there was no explanation offered for the six minutes between the formal turnover of Mr. Burton at 2:00 a.m. and the first test at 2:06 a.m. I note that my review of the evidence shows that Constable Ritchie conducted the self-test of the intoxilyzer at 1:59 a.m. in the presence of the accused who had arrived at 1:58 a.m. This discrepancy between the officers' time pieces would seem to account for at least two minutes of the delay, leaving only four remaining.

32 There remains the six minutes of delay that was unexplained between the two tests. I am therefore left with approximately ten minutes of ill- explained or unexplained delay.

33 The "as soon as practicable requirement" is in place to both ensure the integrity of the presumption it underpins, and to minimize any depravation of liberty that results from these investigations. However, it does not require the Crown to account for every minute between the arrest and the test. The touchstone consideration is whether the tests were taken "within a reasonably prompt time under the circumstances", R. v. Vanderbruggen *[2006] O.J. No. 1138*, paragraph 12, Ontario Court Appeal. I must consider both the overall delay and any unexplained or inordinate periods to determine if this was the case. Here I am faced with an overall delay of 74 minutes. This is not of itself unreasonable. The unexplained parts of that delay amount to some ten minutes, a figure that barely rises above the nominal. I am unable to give any effect to this argument.

Issue three, doubt as to the accuracy of the instruments.

34 The defence has raised the argument that I should have a reasonable doubt about the accuracy of the Intoxilyzer 8000C such that Section 258(1)(c) cannot apply, that is the presumption. This is based on the evidence of the toxicologist that the NIST thermometer had not been calibrated within the manufacturer's guidelines.

35 Numerous cases were cited to me on the issue. The one that is binding on me is R. v. Lam *2015 ONSC 2194*, where Justice Goldstein of the OSCJ held at paragraph 31, "It is not enough to simply say the machine wasn't maintained properly. An accused person must be able to say the machine wasn't maintained properly, and it led to a problem with the machine". In Lam, Justice Goldstein found that the trial judge's error had been to elevate a recommendation for yearly inspections into a rule. In this case I am being asked to do the same for a guideline for calibration for the NIST thermometer. For the same reason, this argument must fail.

Issue four, reasonable and probable grounds.

36 Mr. Burton's failure of the ASD test in this case is clearly the only basis on which PC Cox could find that he had reasonable and probable grounds for the Section 254(3) demand. PC Cox was clear that he believed the test was properly administered and thus the subjective element of his grounds was satisfied.

37 However, the issue is joined because the various limitations the defence exposed in PC Cox's evidence may undermine the reasonableness, the objective element, of that belief. The Ontario Court of Appeal in Topalitsis *[2006] O.J No. 3181*, held at paragraph nine, that,

> The Crown is not required to prove in every case that the device was in proper working order, but rather that the trial judge must simply assess whether on an objective basis the officer had reasonable grounds for believing that the approved screening device was in good working order.

38 In R. v. Ho *2014 ONSC 5034*, Justice McIsaac held that, "The relevant time at which to assess the officer's state of mind is as he made the demand, not as he was being cross-examined". However, it is also clear that cross-examination at trial does have a significant role in revealing the basis for the officer's belief. External evidence, such as from a toxicologist, can also inform this assessment.

39 There were six areas that were identified as undermining the reasonableness of PC Cox's belief, I will deal with each in turn.

(a) PC Cox did not inquire of Mr. Burton whether he had smoked or consumed alcohol in the 15 minutes leading up to the ASD test. It was submitted that he could not therefore be objectively satisfied with the accuracy of the text as the manufacturer recommended a clear 15 minutes.

40 In this instance there was no information that Mr. Burton had either consumed alcohol or smoked within the 15 minutes preceding the test in question. In such circumstances this issue was laid to rest by the Ontario Court of Appeal in R. v. Einarson *[2004] O.J. No. 852*, where it was held at paragraph 35,"The mere possibility that a driver has consumed alcohol within 15 minutes before taking the test, does not preclude an officer from relying on the accuracy of the statutorily approved screening device". This argument does not impact the reasonableness of PC Cox's belief.

41 I'll deal with (b) and (c) together. The temperature and the decimal point. The fact that PC Ritchie calibrated the device to 100 mg of alcohol per 100 ml of blood can also have no effect on PC Cox's belief.

The same is true of PC Ritchie's failure to note the temperature during the calibration process. These are things that are completely outside of the purview of PC Cox.

42 Quite apart from the fact that I have no hesitation in finding that the evidence of PC Ritchie's calibration of the machine does not raise any real question as to its functioning, the law is crystal clear that such technical considerations, if unknown to the operating officer, cannot influence his belief.

(d) The self-test, or rather it's timing. Mr. Joseph testified that the self-test of the ASD should happen immediately before the actual test. However, when he attempted to find this passage in the operator's manual, it wasn't there, and he conceded that it may "be just something that we teach at the CFS". I find that I cannot conclude that the omission of something that doesn't even make it into the operator's manual, would cause a reasonable person to doubt the ASD's accuracy. This argument fails.

(e) The fail setting. PC Cox thought the ASD was set to record a fail at readings over 80 mg. In fact it was set to record a fail at over 100 mg. Would a reasonable person think that this detracts from PC Cox's understanding of the instrument, such that he could not form reasonable and probable grounds from using it? The fact is that Mr. Burton's reading was possibly 20 mg higher than PC Cox thought it might have been. Both readings provide reasonable and probable grounds that mandate the same action. This argument also fails.

(f) The lights, numerals and tones. The defence argues that PC Cox's ignorance of the sequence of numerals, letters, lights and the tone which signals the device as moving towards and achieving readiness, was such that he could not reasonably rely on the results of the test he administered. While the expert conceded that he didn't even know the numerical and letter sequences, and would not expect an officer to know them, the fact of a yellow light appearing before the green was important. This was also true of the tone that should accompany or follow the green light. The tone is the signal that the device is ready. PC Cox said there was no such tone.

43 It was clear from the expert's evidence that PC Cox should have been listening for this tone, as only its appearance in conjunction with the green light could tell an informed operator that the machine was ready to receive the sample. The expert was clear that without the tone the machine had not signaled its readiness.

44 PC Cox's reliance on this evaluation instrument has to meet an objective standard of reasonableness, it is entirely proper to question whether his understanding of the machine he was using is complete enough to meet that standard.

45 While, as described above, many aspects of the device's functioning will surely exist below the officer's notice, the same cannot be said for the noise it makes to signal it is ready.

46 The Crown argues that PC Cox turned it on, and eventually the green light came on. He had self-tested the device earlier, and checked its calibration, and all of that is enough. The expert testified that it is not enough. The expert testified that it is the combination of the tone and the green light that is the signal that the instrument is ready. If it didn't produce the tone, and PC Cox didn't know it should, how could it be relied upon for either the self-test or Mr. Burton's test? Though different on its facts, this level of ignorance

of the device being used, is similar to that encountered by Justice Ducharme in Au Yeung *[2010] O.J. No. 1579*.

47 For similar reasons I am satisfied that PC Cox's ignorance of the device he was using was so profound as to make his reliance on it objectively unreasonable.

48 Without that reliance on the device, there were no grounds to form an opinion that Mr. Burton was over 80. Therefore the subsequent breath demand amounted to a violation of Mr. Burton's Section 8 rights.

49 In sum, he has to at least know when the device is telling him it's ready for its use to be objectively reasonable.

Section 24(2)

50 Au Yeung supra, is cited to me by the defence as authority that the samples obtained following the violation should be excluded here. The case is not binding authority to that effect, as other decisions from the Superior Court, such as Ho, also supra, have come to opposite conclusions. However, all authorities are agreed that the required application of the test in R. v. Grant *[2009] 2 SCR 353*, is fact specific in every case. I will therefore attempt to apply that test to these facts.

Part one, the seriousness of the Charter infringing state conduct.

51 In R. v. Grant the Supreme Court of Canada spoke clearly to trial judges to the effect that exclusion of evidence should be far from automatic when Charter breaches are found in the over 80 context. This, however, was not a trivial breach. PC Cox was assigned to the Ride Program that night where his duties would inevitably involve administering ASD tests to motorists. He did not know what the signal was to indicate that the instrument was ready to receive a sample. He was not a rookie. He has used these devices many times, and he clearly was not up to the responsibility.

52 As happened to Mr. Burton, citizens would be arrested, handcuffed, searched and transported to the police station to give samples of their breath against their will on the basis of the test PC Cox administered.

53 I find that this officer's conduct falls into the same category as the officer in Au Yeung. In that case Justice Ducharme found that despite society's need to combat impaired driving, the administration of justice would fall into disrepute if at (paragraph 55) "such shoddy police conduct were permitted to form the basis of the arrest, detention and subsequent testing of drivers". This branch of the Grant test favours exclusion.

54 Part Two. Impact on Charter protected interests of the accused. As stated above, Mr. Burton was arrested, searched, handcuffed, transported and subject to seizure of his breath samples. He ended up detained in custody for 74 minutes. His vehicle was also impounded. While this deprivation of liberty was mitigated in its length by the proximity of the arrest to the police station, it is still significant enough that this factor narrowly favours exclusion.

55 Part Three. Society's interest in adjudication of the case on its merits. I have already found that the Intoxilyzer 8000C results obtained in this case constitute reliable evidence. They are also necessary to the viable prosecution of this case. Generally this will mean that this branch of the Grant test favours admission

of the evidence. However, under this heading I must also be mindful of the need to take the long view of the effects of this type of police conduct. I am inclined to agree with Ducharme J. in Au Yeung, supra, where he held at paragraph 69.

> In my view the public should expect that when they are stopped by the police their Charter rights will be respected. Certainly the public must have confidence in the police and in the fact that they will not arrest driver's without the requisite grounds. Even more importantly the public must have confidence that those officers who are charged with exercising the important powers under Section 254 of the Criminal Code, have the necessary skills and training to do so in a manner that complies both with the Criminal Code and the Charter.

56 I am also mindful that this was a case where the readings obtained were at the very low end of the scale, and that there were no symptoms of impairment. In that situation this member of the public was faced with an officer that did not even know how the device he was using tells him it is ready, and apparently never consulted a manual to find out.

57 In balancing all of these factors I find that to admit the evidence here would be to bring the administration of justice into disrepute, and it is therefore excluded.

58 There being no evidence of his alcohol level, Mr. Burton is therefore found not guilty, and the charge is dismissed.

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