2011 ONCJ 521
Ontario Court of Justice

R. v. Alfred-Guymour

2011 CarswellOnt 11029, 2011 ONCJ 521, [2011] O.J. No. 4614, 97 W.C.B. (2d) 528

HER MAJESTY THE QUEEN AND RONALD ALFRED-GUYMOUR

Richard Blouin J.

Heard: August 15, 2011
Judgment: October 12, 2011
Docket: Newmarket 4911-998-10-09844-00

Counsel: D. Moull, for Crown
D. Midanik, for Accused, Ronald Alfred-Guymour

Subject: Criminal; Constitutional

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Offences — Driving/care and control with excessive alcohol — Presumption of alcoholic content at time of offence — Sample taken as soon as practicable

Accused driver failed roadside screening demand and was arrested at 5:30 a.m. — Arresting officer (officer) alleged that she called dispatch at this time and requested breathalyzer technician (technician) — Technician alleged that he did not receive dispatch until 6:06 a.m. — At 5:32 a.m., accused asked to speak to his lawyer, C, or to duty counsel if C could not be reached — Officer organized removal of accused's vehicle during eight-minute period — Officer left scene with accused at 5:42 a.m. and drove to police station — Booking process was completed at 6:05 a.m., at which time officer called C's cell phone and left message — Officer called C's law office, was put on hold for 20 minutes, and left message — Officer contacted duty counsel at 6:29 a.m., who called back and was put in touch with accused at 6:35 a.m. — Technician arrived at police station at 6:37 a.m. and prepared breathalyzer — Accused provided breathalyzer samples at 7:09 a.m. and 7:33 a.m. — Accused was charged with driving with excessive blood alcohol — Accused acquitted — Breathalyzer readings were not admissible to establish blood alcohol concentration at time of driving — Breathalyzer samples were not taken as soon as practicable — Evidence was unclear as to what occurred between 5:30 to 6:06 a.m. — Either officer did not phone dispatch at 5:30 a.m., or she did and nothing was done about request for technician until 6:06 a.m. — Either way, police did not act to ensure breathalyzer tests were conducted as soon as practicable — Delays to remove accused's vehicle and to initiate contact with counsel did not offend requirement to take breathalyzer samples as soon as practicable.

Table of Authorities

Cases considered by *Richard Blouin J.*:

R. v. Vanderbruggen (2006), 2006 CarswellOnt 1759, 29 M.V.R. (5th) 260, 206 C.C.C. (3d) 489, 208 O.A.C. 379 (Ont. C.A.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46
s. 258(1)(c) — considered

TRIAL of accused charged with driving with excessive blood alcohol.

***Richard Blouin J.*:**

1 Ronald Alfred-Guymour stands charged that on September 19, 2010 he committed the offence of Driving While Over 80. He was originally arraigned on an Impaired Driving charge, but the Crown requested dismissal after hearing evidence. The Crown called three witnesses. The defendant did not testify.

2 This case commenced despite late disclosure of the notes of an officer the Crown intended to call as a witness. After some discussion, and although the defendant was perfectly entitled to request an adjournment, both counsel agreed the best approach would be to hear evidence from two Crown witnesses. The main focus was to be on the issue of whether the breath samples were taken "as soon as practicable", as required by s. 258(1)(c) of the *Criminal Code* to allow the presumption that those sample readings were the same as at the time of driving. Both parties agreed I should decide that issue on the evidence called using the remaining court time that day, and deal with the *Charter* issue at a later date, if necessary.

Crown Evidence

3 P.C. Mason Baines was on his way to work at approximately 5:20 a.m. when he observed the defendant's vehicle swerving between lanes of southbound traffic. Thinking the driver might be impaired, he used his cell phone to contact police communication. When a uniform officer (P.C. Roach) attended the scene, he left. Back at the station, sometime after 6:00 a.m., the officer observed no signs of impairment. At 8:45 a.m., Baines served documents on the defendant.

4 P.C. Roach received a radio call to respond to P.C. Baines communication at 5:27 a.m. She stopped the defendant's vehicle. The driver had bloodshot eyes and an odour of mint was coming from within the vehicle. No other signs of impairment were noticed. The defendant, when asked, admitted drinking a beer at a friend's place not far away. The officer then made a roadside screening device demand. The defendant produced an "F" reading and was arrested at 5:30 a.m. At 5:32, rights to counsel were given, whereupon the defendant responded that he wished to speak to his lawyer, Peter Connelly, but that duty counsel would be acceptable if Connelly was not reached. At 5:34 a.m., the breathalyzer demand was read and understood. By this time another officer, Daviduke, was on scene to assist Roach.

5 At 5:42 a.m., Roach left the scene with the defendant. Before leaving, Roach organized the removal of the defendant's vehicle with his friends during an eight-minute period. They arrived at 5 District at 5:45 a.m. The booking process took 20 minutes, and at 6:05 a.m. Roach called Peter Connelly's office. After no response, she called his cell phone, and left a message. Then, at 6:08, Roach called the law office emergency line which she believed was provided on the cell phone message. At 6:25, after being placed on hold for 20 minutes, she spoke to a receptionist and left a message for Connelly. At 6:29, Roach contacted duty counsel, who called back at 6:33 and was put in touch with the defendant at 6:35. After the defendant spoke to duty counsel, Roach turned him over to P.C. Baines at 6:39.

6 P.C. Roach indicated in cross-examination that she notified dispatch "right away" after arrest to ensure that a breath technician would be available to administer the test. That notification was not in her notes. When asked if she knew why a breath tech did not get notified until 6:06 a.m., she said she did not know (but maybe one was not on duty).

7 P.C. Hawthorne, a Qualified Technician, started work that day at 6:00 a.m. He was patrolling when he received a dispatch, at 6:06 a.m., to attend at 5 District to conduct breath tests. It was 6:37 a.m. when he arrived. After receiving information regarding

this case, keying information into the Intoxilyzer 5000C, conducting diagnostic and calibration checks, the Intoxilyzer was ready for use at 7:08 a.m.

8 The defendant provided the first sample at 7:09 a.m., which was recorded at 165 milligrams in 100 millilitres of blood. The second sample was provided at 7:33 a.m. (150 milligrams). Hawthorne was asked if something as simple as turning on the machine before his arrival would have sped up his preparations. He responded affirmatively, by 20 minutes. However, no one other than qualified breath technicians were allowed to operate, or do anything to, the Intoxilyzer.

As Soon As Practicable

9 The leading case in this area is *R. v. Vanderbruggen* (2006), 206 C.C.C. (3d) 489 (Ont. C.A.) wherein the Ontario Court of Appeal states at paragraph 12:

> There is no requirement that the test be taken as soon as possible. The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably.

10 Also, from paragraph 13:

> In deciding whether the tests were taken as soon as practicable, the trial judge should look at the whole chain of events bearing in mind that the Criminal Code permits an outside limit of two hours from the time of the offence to the taking of the first test. The "as soon as practicable" requirement must be applied with reason. In particular, while the Crown is obligated to demonstrate that - in all the circumstances- the breath samples were taken within a reasonably prompt time, there is no requirement that the Crown provide a detailed explanation of what oc

curred during every minute that the accused is in custody.

11 The defendant submits that three time periods should be examined:

> 1. 5:34 a.m. to 5:42 a.m., during which P.C. Roach assisted the defendant in making arrangements, through friends, to have his car driven away as opposed to being towed. Although the defendant appreciated the gesture, there was no evidence as to why P.C. Roach needed to attend to this issue, as opposed to Davidude, when she had other more pressing concerns (i.e. ensuring breath samples were taken as soon as practicable).
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> 2. Given that the defendant's wish to speak to his lawyer, or alternatively duty counsel, was known at 5:32 a.m., there was unreasonable delay occasioned by not attending to that issue until after the booking procedure was complete at 6:05 a.m. The defendant submitted that it was unreasonable for P.C. Roach to not ask dispatch to contact Mr. Connelly and/or duty counsel which, if done, would have shortened the process of consultation with counsel.
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> 3. The arresting officer testified that she notified dispatch, right after arrest at 5:30 a.m., that a qualified breath technician was needed. She had no notes of this because it was her normal and consistent practice. The only evidence of a notification of a qualified technician was that of P.C. Hawthorne, who testified that he received a dispatch at 6:06 a.m.

12 In my view, the evidence in this case demonstrates inattentiveness by the police to the statutorily mandated requirements of conducting breath tests as soon as practicable. The police did not act reasonably promptly. Either P.C. Roach did not phone dispatch at around 5:30 a.m., or she did and nothing was done about the request until 6:06 a.m. Either way, the police did not act to ensure the breath tests were conducted as soon as practicable. Essentially, the evidence is unclear as to what occurred during a significant time period (5:30 to 6:06 a.m.).

13 The prosecution is accorded the evidentiary shortcut of proving blood alcohol concentration at the time of driving by establishing the blood alcohol concentration discovered by testing at the station, provided they comply with pre-conditions set out in s. 258(1)(c). They must establish that the pre-conditions were, in fact, met. They have not done so, and I am unable to admit the results of the breath tests.

14 Regarding the delay to remove the defendant's vehicle, I do not find that eight-minute delay offends the as soon as practicable requirement. While it was possible that another officer could have assumed the vehicle removal task, P.C. Roach acted reasonably, and admirably, in assisting the defendant. Likewise, even though there may well be a more efficient method by which to initiate contact with counsel, I cannot conclude the police were unreasonable, or inattentive to their duties, by pursuing the issue in the manner they did. In other words, it may have been possible to do things faster, but that is not the test.

Samples 15 Minutes Apart

15 Finally, the defendant argued that the Crown failed to establish another requirement of s. 258(1)(c), that the samples be taken at least 15 minutes apart. I accept P.C. Hawthorne's evidence that although there was some confusion around times displayed on the Intoxilyzer, the samples were taken at 7:09 a.m. and 7:33 a.m. The Crown proved that element.

Result

16 Accordingly, since the breath samples were not taken as soon as practicable, the breath readings cannot be related back to the time of driving. The defendant must be found not guilty of the Over 80 charge.

17 Given my ruling, and as agreed upon by counsel, the remaining *Charter* issues are moot, and I will vacate the trial continuation date of February 3, 2012, and the remaining trial time of six hours will be returned to the trial coordinator.

Accused acquitted.