"Client acquitted of impaired driving/over .08 after Judge agreed police officer acted improperly"
[COMMENTS BY RICHARD NEARY]

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
CRIMINAL COURT

REGINA

-

V.

REASONSFORJUDGMENT OF
THE
HONOURABLE
JUDGE.E.C.BLAKE

Counsel for the Crown:	Patrick Weir, Esq.
Counsel for the Defendant:	Richard Neary, Esq.
Place of Hearing:	Victoria, B.C.
Date of Hearing:	August 20, 2008
Date of Judgment:	October 16, 2008

[1] At his trial on charges of impaired driving and driving while over .08, the Defendant has contended that his Charter rights were breached by Constable Jones during the course of the police investigation. A *voir dire* has been conducted and I am now In a position to decide whether the Defendanfs Charter rights were indeed breached. I emphasize however, that the issue of Charter remedies was deliberately left for consideration another day, pending the outcome of this first stage of the Inquiry.

[2] In particular, the Defendant alleges that his Charter rights were infringed in the following ways:_

1. The Defendant maintains that Constable Jones had insufficient grounds upon which to demand the performance of the roadside screening test (the "ASD test). It is common ground that the failed ASD test led to the s.254(3) breath test demand (the datamaster demand) and the breath test at the police station (the datamaster test')The Defendant therefore alleges that the datamaster test consltuted a breach of the Defendant's right to be free from unreasonable search and seizure pursuant to s.8 of the Charter;

2. The Defendant says that Constable Jones did not make the demand for an ASD test in the timely fashion contemplated by s.254(2), further resulting in flawed ASD testing and, ultimately, a further breach of his s.8 rights;

3. The Defendant submits that Constable Jones breached his rights by failing to advise him of the reason for his detention at the commencement of the impaired driving investigation, as required by Charters. 10(a); and

4. The Defendant asserts that the performance of the datamaster tests did not take place "as soon as practicablen because of the delay which occurred at the roadside prior to the Defendant being transported to the police station.

[3] Despite giving the matter full consideration, I remain perplexed as to how the fourth issue enumerated above could amount to a Charter breach or lead to Charter relief. It seems to me far more appropriate to address the fourth issue when assessing the possible application of the statutory presumption contained ins. 258(1)(c).

Accordingly, I do not propose to consider that particular issue any further in the present decision, and I will concentrate instead on the fltst three listed issues.

BACKGROUND EVIDENCE AND FINDINGS OF FACT

[4] It is important to be clear on the findings of fact which give rise to the conclusions reached on the Charter issues. At the same time, however, the findings of fact must be summarized as briefly as possible, bearing in mind that the trial has not yet concluded.

[5] Shortly before 3:40 in the morning on December 2, 2007 Constable Jones observed the Defendants vehicle traveling northbound on Vernon Avenue in Saanlch, British Columbia. The Defendants vehicle was traveling at about 80 kilometres per hour. The officer noted that although the Defendant's direction of travel would have taken him to an 80 kilometre speed zone within a matter of seconds, the speed limit was actually 50 kilometres per hour at the precise point where the Defendant was first observed. The officer conceded that drivers frequently increase their speed to the higher limit in advance of the location where they are permitted to do so, but he also noted that conditions were wet and icy on this particular occasion, contributing to his belief that the Defendant was driving in an unsafe manner.

[6] As a result of his observation of the Defendant's speed and the prevaili':lg road conditions, Constable Jones pursued the Defendanfs vehicle and signalled for it to pull to the side of the road. He noticed nothing erratic or unusual in the Defendant's manner of driving and the stop occurred in normal fashion. By the time the police officer had caught up to the Defendanfs vehicle the posted speed limit had indeed increased,

while the Defendant's actual speed had not, so that the Defendant was no longer speeding.

[7] Constable Jones noted the time to be 3:40 am as both vehicles came to a stop by the roadside. Before getting out of his car, the police officer performed a computer check to determine the identity of the registered owner of the vehicle he had just stopped and to see whether he faced any potential risks to his own safety in light of that information. He determined the Defendant to be the registered owner of the vehicle and the computer Information revealed no reason for- safety concerns. At about 3:43 am he approached the drivers' side window of the Defendanfs vehicle and spoke to the Defendant.

[8] Constable Jones Immediately advised the Defendant that he had been stopped for speeding and asked for an explanation. The Defendant said that he was just going home. The police officer asked for the Defendant's drivers' licence and insurance. The documents were produced without incident and the officer was satisfied of the Defendant's identity.

[9] As he spoke to the Defendant, Constable Jones noted a slight odour of liquor emanating from the Defendant's vehicle. He could see that there was a passenger in the front passenger seat beside the Defendant, making it difficult to determine the source of the odour. He also observed, however, that the Defendant spoke with a slight slur to his speech, and appeared to have both a dry mouth and bloodshot, glassy eyes. He had never met the Defendant previously and conceded that his observations were

equivocal in relation to alcohol imp irment, especially since it was very late at night and the Defendant, who was entirely cooperative, had no difficulty speaking coher ntly.

[10] At approximately 3:46 am Constable Jones asked the Defendant to step from his car, and walk to the back of the vehicle, off the roadway. In his testimony, the officer stated that there were two reasons why he asked the Defendant to do so. Partly, the officer was considering his own safety, since he was standing very near the traveled portion of the roadway so long as he continued to speak to the Defendant through the window of the drivers' door. Second, he wished to observe the Defendant more closely for signs of Impairment, and to separate him from the odour of liquor in the mo or vehicle so as to better determine the source of the smell. In view of the second stated .reason,.,the officer conceded that he was in part seeking to further an investigation of possible alcoholimpairment when he asked the Defendant to step from his vehicle.

[11] Once the Defendant was out of his vehicle he walked to the back of his vehicle under Constable Jones' watchful eye. The constable saw nothing amiss. At the back of the car, the officer told the Defendant that he suspected him of drinking and driving. He asked the Defendant the following question, and received the following answer:

> Q: How much have you had to drink tonight?
> A: Two drinks.

[12] The answer may have been "two beers" rather than "two drinks"; the officer was not sure.

[13] During that brief exchange, the officer noted that there was a smell of liquor on the Defendant's breath and person" and that the Defendant swayed slightly, front to back. At that point.he read the roadside breath demand to the Defendant The. resultant fail reading led immediately to the s. 254(3) breath demand.

[14] It is crucial to note that by 3:46am, the time when Constable Jones asked the Defendant to step from his vehicle, the officer had formed In his own mind the grounds essential to making a roadside breath demand. The evidence in that respect was generated in a rather unusual fashion and It was discussed at length in counsel's submissions to the Court at the conclusion of the voir dire. It Is important, therefore, that I make further comment on that aspect of the· matter now.

[15] In his direct testimony, Constable Jones was not specifically asked to state the time at which he formed the grounds for making the roadsfde breath demand. He testified only that he made the demand "shortly before 3:57 a.m.". Other evidence revealed that 3:57 a.m. was the time when the ASD testing was compl ted.

[16] In cross-examination, however, .defence counsel explored in more detail the exact time when the grounds for the ASD demand were formulated. This exploration was·to be expected, I would think, since the evidence plainly disclosed a period of about 17 minutes from the time when the o cer stopped the Defendant's vehicle to the time of the roadside.breath testing, an interval which seems inordinately long on the face of it.

[17] Defence counsel asked Constable Jones if he formed the suspicion that the Defendant had alcoholih his body while the Defendant was still seated in his car (ie., no later than 3:46 am). The pollee officer thought about his answer for some time, and carefully responded in the affirmative. Defence counsel then asked if the officer would characterize his suspicions while the Defendant was still seated In the car as being "reasonable" and again the officer took his time before responding in the affirmative, bolstering his responsby saying that hs opinion was bnsed on more than one factor that he had obs rved.

[18] In submissions, Crown counsel asked the Court to conclude that when the officer spoke of having a "reasonable suspicion" that the Defendant had alcohol in his body at or before 3:46 am, he was not using the phrase in the same way In which the words are used In s. 254(2) of the Criminal Code; instead, Crown counsel submitted, he was speaking in generalt layman's terms. On full refection I find that I cannot aceept that submission, although I must confess that it had some initial attraction to me. The phrase "reasonable suspicionis not a term of art, nor is it difficult to understand. Furthermore, the officer was asked to comment on the application of the phrase to a drinking-driving case, in circumstances which could not have been clearer or more pointed. It seems to me that considerable mischief could flow from any judicial decision which implied that there is some sort of technical meaning to be given to the phrase "reasonable suspicion" that· differs in an unspecified way from its everyday, vernacular meaning.

THE LEGAL BACKGROUND

[19] The facts of this case engage certain general principles which must be briefly addressed now.

[20] The first matter to note is the nature of the "reasonable suspicion" that is required before a peace officer can make legally enforceable roadside breath demand. Counsel have provided me with a number of authorities on that point, and I have reviewed all of them. The general principles are not particularly in dispute in the case afore me, however, and so, at the risk of sounding smug or pedantic, I will merely summarize by repeating what I said in *R v. Murray,* (2008] B.C.J. No. 804, at paragraph 4:

> In dealing with the issue of the sufficiency of the ASD demand, the Crown is required to present evidence to prove on balance of probabilities that the police officer had a reasonable suspicion that the accused had alcohol in [his or] her body while operating a motor vehicle. The suspicion must be adjudged reasonable both from an objective and a subjective point of view, while recognizing that the words "reasonable suspicion" signify a fairly low threshold test. It has been said, for exmple, that "a smell coupled with even minimal symptoms and erratic driving should reasonable permit the officer to make a demand so that he may properly investigate a possible offence": *R. v. DiGiulio,* [2006] B.C.J. No: 1449 (PC} (QL} at paragraph 27, per Baird Ellan, PCJ.

[21] An important second point to note is the interplay between the legislative provisios concerning roadside breath testing and fue riglit of a detained person to the benefit of legal counsel as described in s. 10 (b) of the Charter. The courts have long held that the absence of any opportunity for a detained driver to retain counsel in the face of a demand for a roadside breat sample constitutes a violation of s. 10(b} of the

Charter, but is justified under s.1 of the Charter as a reasonable limit prescribed by law: *R. v. Thomsen,* [1988] 1 SCR 640.

[22] The corollary, however, is that roadside breath testing must be conducted with immediacy if it is to pass constitutional muster. As Fish, J. stated in *R. v. Woods,* (2005] SCJ No. 42 (QL) at paragraph 14:

> Section 254(2) depends for its constitutional validity on its Implicit and explicit requirements of immediacy. This immediacy requirement Is implicit as regards the pollee demand for a breath sample, and explicit as to the mandatory response: the driver must provide a breath sample •'forthwith".

[23] While it is now clearly established that the "forthwith" requirement has to be interpreted with some flexibility, the courts are alert to the necessity *of* being vigilant so as not to unduly water down the immediacy of the procedure and thereby extend the statutory scheme beyond the constitutional boundary within which it is meant to operate: *R. v. Bem haw,* [1995] 1 SCR 254, at paragraphs 72 to 75; *R. v. Woods,* referred to above, at paragraph 28; *R. v. Aebi,* [1992] OJ No. 2373 (Ont CJ C?en.Div.) (QL); and *R. v. Friesen,* [2005] BCJ No. 93 (PC) (QL).

[24] In view of the constitutional requirement for careful compliance witstatutory time limits in the conduct of roadside breath testing, it follows that once the peace officer has formulated the requisite grounds for the ASD demand, neither the demand nor the actual performance of the tests should be delayed by the gathering of evidence to support a prosecution for impaired driving: *R. v.* Sood, [2005] AJ No. 1660 (PC)(QL); *R. v. Megahy,* [2008] AJ No. 585 (Alta CA)(QL).

[25] Finally, I should make comment about the application of s. 10(a) of the Charter to cases involving the detention of drinking-driving suspects at roadside. The section provides that a detained person has the right to be informed promptly of the reason(s) for his or her detention. The Supreme Court of Canada specifically noted, in *R. v.Orbanski* [2005] 2 SCR 3, at page 31, that the section applied to detained drivers under investigation for impaired driving.

[26] Counsel before me made reference to a number of cases which have held that where circumstances are such that the detainee would know or be able to infer the reason for his or her detention, the breach of the s.10(a) right may be immaterial: *R. v. Martin* (1998), 108 BCAC 1 (CA); *R. v. Wiilams,* [2007] BCSC 184; *R. v. Herter,* [2007] ABQB 756; and *R. v. Nedelak,* [2008] BCNo. 1275 (PC)(QL).

[27] I fully accept that there are circumstances in which a peace officer's explanation of the reason for detention would be superfluous and would risk adding a dangerous air of formality to an already tense situation. Nonetheless, it is important to avoid being overly dismissive of the protection offered by the Charter provision. Section 10 (a), after all, must be taken as embodying one of the fundamental rights of persons detained by the authorities; as such, it is deserving of due recognition, and that signifies recognition by more than mere lip service.

[28] In the context of a roadside drinking-driving investigation, it is surely not too much to ask that as a general rule a peace officer promptly inform the detained driver of

the true focus of the investigation. Drinking-driving Investigations frequently take place late at night, without a *great* dealof forewarning for either the Investigator or the driver. Such investigations are thus potentially exceedingly stressful and dangerous for both participants. It seems to me not unreasonable in such circumstances to judicially encourage ensible, flexible compliance with s. 10 (a). There are very good practical reasons to expect that a detained driver would promptly advised ; for example, why it is that he or she is being asked to step from the vehicland to walk off into the night with a police officer.

[29] In conclusion on this aspect of the matter, I must say that I am in full and respectful agreement with the comments of Metzger, J. in *R. v. Ryan,* [2008] BCSC 938. At para raphs 18 to 32 of his decision *in* that case, His Lordship rightly warns that it is unacceptable, and inconsistent with Charter analysis generally, to maintain tht anyone who has been drinking and driving must be taken as already knowing the true reason why he qr she has been detained. Such an int rpretation wrongly implies that s. 10(a) of the Charter, and by implication Charter protection generally, is only available tO? the truly innocent.

APPLICATION OF LAW TO FACT

[30] My conclusions With respect to the first two breaches alleged by the Defendant are in large part determined by the factual assessment that Constable Jones had formed, in his own mind at least, the necessary grounds to make the ASD demand by 3:46 am at the latest, the time when the Defendant stepped from his vehicle.

[31] First, it is clear to me that the information available to the police officer up to the time when the Defendant stepped from the vehicle could not by any stretch be characteriaed objectively as giving grounds for "reasonable suspicion" that the Defendant had alcohol in his body. The driving pattern was, at best, marginally probative of alcohol impairment. The observations made of the Defendant while he sat ir1his vehicle could fairly be described in much the same way. Until the further Investigation occurred at the back of the Defendant's vehicle the police officer had not even determined that the slight smell of alcoholwhich he noted came from the Defendant's person, and he conceded that the other minor.observations of the Defendant which he made through the car window were equivocal in all the prevailing circumstances.

[32] I am, of course, mindful of the need to consider the totality of the evidence and not engage in mere piecemeal analysis, even so I find that the relevant observations made by Constable Jones fall considerably short of meeting the low threshold test which is applicable.

[33] Likewise, the finding that the officer felt he had grounds for the ASD demand by 3:46 am spells doom for the Crown on the issue of the timeliness of the demand actually made. The best assessment of the time of the ASD demand is approximately 3:54 am. That was about fourteen minutes after the Defendant's vehicle was stopped and a full eight minutes after the formation of the grounds for the ASD in the officer's mind.

[34]. The time after the formation of the grounds was taken up,in large part, by a form of impaired driving investigation on the officers part. Since he already felt he had the necessary grounds for the ASD demand before the Defendant even left his vehicle, it follows that his investigation at the back of the vehicle rriust have been for purposes unrelated to the ASD testing.

[35] It was not lost on me that in hjs testimony the officer seemed puzzled when asked whether he was aware of any time limits relevant to the performance of ASD testing. After considerable hesitation, he ventured the opinion that he was required to complete the ASD testing procedure "within a reasonable time". He then reconsidered and stated that he recognized the need to proceed "realquick", before eventually. settling on the wording "as soon as practicable" as.being applicable. The word "forthwith" never did escape the officer's lips.

[36] In the end result, I am of the view that the.explanations given by the officer for allovJtng about eight minutes to pass, after forming his grounds but before making the demand, lead inescapably to the conclusion that the demand was unlawful. It was simply too late in coming.

[37] I will also comment on the s. 10(a) issue. Plainly, Constable Jones had detained the Defendant by the time he asked the Defendant to step from his vehicle. He did so, at least in part, for purposes of conducting an impaired driving investigation. He did not, however, inform the Defendant of the purpose of the investigation.

[38] . In this particular case, I do not think it would be proper to infer that the Defendant knew, or should have known, of the direction which the police officer was taking. During the time he remained in the drivers' seat of his vehicle, the Defendant's discussion with the police officer did not even touch upon the question of alcohol consumption. The officer told the Defendant only that he was concerned about the speed with which his vehicle was being driven.

[39] In such circumstances, it is not at all clear to me why the Defendant should be taken to have known that the officer was primarily interested In Investigating the Defendant's alcohol consumption and state of sobriety. As Metzger, J, pointed out in the *Ryan case,* referred to above, the combination of alcohol consumption and driving a motor vehicle is not In and of itself illegal in this country.

[40] To the extent that it is relevant at all to consider the Defendant's previous involvement with the police, it can be noted that there is no evidence of any history of that sort. The police officer had determined that fact from the computer check before he approached the Defendant's car window. All I can fairly say is that the Defendant is a relatively young man; I have no Information at all aboyt his relative naivete concerning the nature of a police roadside stop in the middle of the night.

[41] I do find that the delay in advising the Defendant of the reason for his detention amounted to a breach of s. 10(a) of the Charter. At the same time, however, I am bound to say that on the facts of this case the breach was of a minor nature. The

police officer was not at all abusive or highhanded In.his dealings with the Defendant. The evidence would tend to suggest that both he and the Defendant conducted themselves in an entirely polite and civilized fashion throughout. Given the gnerallevel of his cooperation, it seems likely that the Defendant would have accompanied the officer to the rear of the vehicle even if he had been properly advised of the reason for the officer's request.

[42] Furthermore, the length of the period during which the Defendant remained in the dark about the reason for his detention as minor indeed. As soon as the two of them arrived at the back of his vehicle, the officer advised the Defendant that he suspected he had been drinking and driving. On the authorities, that general statement was clearly sufficient to constitute compliance with s. 10(a). It is just unfortunate that the statement was not made earlier.

CONCLUSION

[43] It Is my view that the Defendant's s.8 Charter rights were breached when the police made demand of him to provide datamaster samples and to accompany him to the police station for the purpose of providing such samples. The grounds for the datamaster demand were substantially generated by the result of the ASD testing procedure. That procedure was flawed by the absence of sufficient grounds for ASD testing at the time that the officer formed his areasonable suspicion" concerning the existence of alcohol in the Defendant's body and by the lateness of the demand after the formation of that suspicion. If, as it must be, the ASD result is removed from

consideration when assessing the police officer's grounds for making the datamaster demand, it is clear that those grounds significantly lacking.

[44] The investigation in this case was also flawed by the officer's failure to comply with s. 10(a) of the Charter by promptly advising the Defendant of the reasons for his detention, but I emphasize that in my view this flaw in the case was not of great significance

E. C. Blake
Provincial Court Judge