ONTARIO COURT OF JUSTICE

Central West Region
Brampton Ontario

BETWEEN:

HER MAJESTY THE QUEEN

-and-

F. B.

REASONS FOR JUDGMENT

Duncan J.

1. The defendant is charged with exceed 80.

2. Just before 1 am, witnesses saw the defendant take a spill on his motorcyclesufferingscrapes-"roadrash"-andpossiblyothernon-visible injuries including a head injury. As luck would have it, the accident occurredrightbesideahospital.Thedefendantgottohisfeetandwheeled the motorcycle toward the emergency entrance. One or more witnesses called thepolice.

3. Apoliceofficerrespondedtothecallandaftersomesearchingfoundthe defendant sitting on a bench outside of the hospital. He had his head down and was muttering. The officer attempted to speak to him, getting close to makeoutwhatthedefendantwassaying.Indoingsohenotedasmellof

alcohol on the defendant's breath. He decided to do an **ASD** test. At 1:21 he read the demand. He did not have a device and called for one to be brought to the scene. He was informed that it may take a while. In factit arrived in about 9 minutes. After testing and demonstrating it, asample was obtained at 1:37, registering a Fail. Sixteen minutes hadpassedsince thedemandwasmade.Theofficerdidnotreadthe rightstocounsel, thoughhemadeapointofnotquestioningorelicitingevidencefromthe defendant during thatperiod.

4. OnthebasisoftheASDFailthedefendantwasarrestedat1:38.Hewas then read his 10b rights culminating with "Do you want to call a lawyer now?"towhichthedefendantreplied"Nah,notnow".Theofficerfeltthat the defendant should receive medical attention. At 1:38 he called for a breath technician and machine to be brought to the hospital. He then took thedefendant(nowhandcuffed)intothehospital.At1:50hewasinformed thatallthetechniciansweretiedup.At1:53QTKoshercalledandsaidhe would be at least half anhour.

5. In fact Kosher didn't arrive at the hospital until 3:24 and was not set up until 3:38 - exactly two hours after his arrest and the making of the demand to provide samples "as soon as practicable". There was little evidence as to what occurred during the waiting period except that the defendant was seen by a nurse at 2:32 and by a doctor at 2:50. The impression leftwasthatthedefendant andtheofficersimplywaited,doing nothing, the defendant handcuffed to abed.

6. Before taking samples, Kosher went over the procedure and read rights to counsel again. The defendant opted to speak to duty counsel and a call andconsultationwasarranged,endingat3:57.Thefirstsamplewasfinally taken at 4:00 am betraying BAC of 150; the second sample taken at 4:30 registered 140. Between samples the defendant was taken for a CT scan. An expert toxicologist's report was entered into evidence relating these readings back to the time of themishap.

ASD and right to counsel:

7. Counselforthedefendantarguesthattherewasa10bbreachin failure to inform the defendant of his right to counsel during the 16 minute delay in administering the ASD. The Crown concedes thispoint.Iacceptthatconcessionandfinda1Obbreach.

Section 8:

8. It also would follow that the ASD test was not conducted "forthwith" as required by the section and therefore the warrantless obtaining of that sample was not done according to theauthorizinglaw.Inturn,theASDresultprovidedthegrounds for the eventual obtaining of breath samples and they too, by domino theory, are tainted as not authorized by law. The presumptionofunreasonablenessforwarrantlesssearcheshasnot been displaced. I am therefore obliged to find a section 8 breach aswell.

Failure to revisit 1Ob:

9. As summarized above, the defendant initially was asked ifhe wanted to contact counsel "now" saying "nah, not right now". At that point in time he was in need of medical treatment. The matter of contacting counsel was not re-visited during the two hours that the defendant was held in detention waiting for breath testing to be conducted. As I understand it, the Crown concedes that rights to counsel *should have* been raised again - but that there was no legal obligation on the part of the police to do so and no *Charter* breach in failing to doso.

10. Ihavenotbeenprovidedwithanycasethatwouldsupporta findingofbreachinthesecircumstances.Tothecontrary,two decisions of the Court of Appeal tend to support the opposite conclusion.

11. InR*v Devries [2009] OJ No* 2421 the defendant had been asked at the roadside if she wanted to speak to a lawyer "now". She simply answered "No". The argument on appeal focused on the informational component of **1**Ob, contending that the police should tell detainees that their right was not to contact counsel "now", that is, at the roadside, but to do so once they got to the station. The Court of Appeal rejectedthis argument holding that

the suggested wording could be misleading depending on the circumstances. The Court however did comment that, where counselhasbeendeclinedatthescene,itwouldbegoodpractice forpolicetorenewtheofferofcounseloncethedetaineearrives at thestation.

12. In*RvOwens[2015] OJ4972,*theexchangebetweenthepolice andthedefendantattheroadsidewasinalmostidenticalwordsto thepresentcase"No,notrightnow".Itwasargued,andaccepted onsummaryconvictionappeal,thatthedefendant'swordsdidnot amount to a waiver and that the police should have followed up on arrival at the police station and either facilitated contact with counselorthenobtainedanunequivocal waiver.ButtheCourtof Appeal disagreed and restored the conviction. It held that the issue was not waiver; rather the issue was whether the defendant had ever invoked his right to counsel. It concluded that the defendant in *Owens* had not done so, the question of waiver was not reached and accordingly there was no 1Obbreach.

13. In my view these cases are distinguishable for a couple of reasons.First,astheofficerhimselfrecognized,thisdefendant wasinneedofmedicalattentionwhenhewasfirstofferedand declinedcounsel.Hiswords"notrightnow"takeonadifferent

complexioninsuchcircumstancesandcannotreasonablybeseen asthelastwordonthesubject.Furtherthiscaseisunique forthe extraordinary length of time that the defendant waited under arrest and in detention after having initially said he did not want to speak to counsel "rightnow".

14. Ithaslongbeenrecognizedthatthedutiesonpoliceinrelation to 1Ob can vary if special circumstances are present: *R v Anderson [1984] OJ No 3100*. In my view in the unique circumstances present in this case the matter of counsel should have been re-visited after medical attention was obtained and during the long waiting period. There was ample opportunity to dosoandeverypossibilitythatthedefendantmighthaveoptedto do so after his immediate medical needs were addressed. In fact he did so when the offer was finally made by the qualified technician. I conclude that this omission amounted to another]' breach of1Ob.

24(2):

15. Theissueofexclusionmustbeassessedaccordingtothewell known*Grant* factors.

16. With respect to the seriousness of the police conduct: This was a very green police officer working on his own and presented with a non-typical situation, unlikely to have been encountered in his training. The first 1Ob violation during the ASD waiting period has to be regarded as borderline. That time period arguably should not include the operating time requirements for testing including self test, explanation etc. So viewed the delay is only 9 minutes, the time for the device to arrive. Even at 16 minutes it is borderline for providing an opportunity to contact and consult with counsel at one in the morning. While I have accepted the Crown concession, the violation is just barely over theline.[1]

17. With respect to the failure to revisit 1Ob during the hospital wait, there is no clear case law on point that has been brought to my attention and my holding, if correct, may very well be breaking new ground. The officer did not fail to fulfill any established legal standard but at worst failed to exercise judgment and common sense that a more experienced officer might have shown. It might also be mentioned that there was nothing preventing the defendant from bringing up the subject himself or requesting a call to counsel while they werewaiting.

[1] See *Quansah* 2012 ONCA 123 where a 17 minute delay was considered to be within the "forthwith" requirement. It may also be of some significance that this defendant was not detained in the senseofhaving. his travels halted as is the case with most in thissituation,,

18. InsumitismyviewthattheCharteroffendingpoliceconduct is low on the scale ofseriousness.

19. The impact on the Charter rights of the accused: With respect to the ASD counsel breach, it is argued that, had the defendant been told of his rights and contacted counsel and had counsel been on the ball, the defendant might have been advised to refu,s e what had become a timed-out invalid demand. There would have been no ASD fail and no grounds for the damning breath tests. While this scenario seems to be unlikely as a practical matter, the logic and theory is sound. So viewed, the impact was great- it was central to the defendant being arrested, charged and now standing in jeopardy ofconviction.

20. With respect to the failure to revisit the issue of counsel, no evidence was sought or obtained during the wait period and the defendant did finally speak to counsel before he gave the breath samples. Still, the timing of the right to counsel is not solely tied to the gathering of evidence. T.ge Supreme Court in *Taylor [2014} 2 SCR 495* emphasized that a detainee should have access to counsel at the first reasonable opportunity, an implicit recognition that such early access has intrinsic value quite apart from its relation to the gathering ofevidence.

21. Insumitismyviewthattheimpactoftheasdcounselbreach on the rights of the defendant was in itself substantial and was augmented to some extent by the laterbreach.[2]

22. Asforthethirdfactor:Thechargeisseriousthoughitisnotan aggravated case of itskind.

23. Inweighingandbalancingthesefactors,whileitisaclosecall, I am satisfied that the long term interests of the administration of justicewillbebetterservedbyexclusionratherthanadmissionof the evidence. In the result, the breath test readings are excluded. Thereisnootherevidencetosupportthecharge.Itisdismissed.

June 18 2018

B DuncanJ

M Johal *for thedefendant*

C Coughlin *for theCrown*

[2] The ASD counsel breach itself was sufficient to justify exclusion by the lower courts in *George {2004}·]· OJ No 3287.* The Crown appellant did not challenge those rulings in the Court of Appeal, a tacit concession that they were correct, at least under the *pre-Grant* regime.