On appeal from a summary conviction in the Provincial Court on January 27, 2023

Date: 20240314
Docket: CR 23-01-39401
(Winnipeg Centre)
Indexed as: R. v. Dzananovic
Cited as: 2024 MBKB 46

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING	)	
	)	Matthew Armstrong
	)	for the Crown
- and -	)	
	)	Mark Wasyliw
ENIS DZANANOVIC,	)	for the appellant
	)	
appellant.	)	
	)	Judgment Delivered:
	)	March 14, 2024

TOEWS J.

FACTS

[1] Enis Dzananovic, the appellant, was observed by a police officer, Constable Halaburda, driving a motor vehicle that failed to stop at a stop sign at Highway 59 at 6:41 p.m. on September 23, 2021. Constable Halaburda, who is a RCMP officer attached to the Steinbach RCMP detachment, was on duty at that time, and conducted a traffic stop.

[2] As a result of the accused admitting to recent alcohol consumption, the appellant provided Cst. Halaburda a sample of breath into an alcohol screening device (ASD) at the demand of Cst. Halaburda. The appellant registered a fail. At 6:52 p.m., Cst. Halaburda

placed the appellant under arrest and read him his rights (6:54 p.m.) and the police caution (6:57 p.m.). The appellant asserted his right to counsel and at 7:01 p.m., Cst. Halaburda allowed the appellant to contact a lawyer using his own phone while seated in the back seat of the police vehicle.

[3] At 7:05 p.m. RCMP Constable Martens, who is also a certified breath technician, arrived at the scene. The two constables had a brief discussion as to where they should take the appellant to have the breath tests administered. Based on the rural location of the traffic stop and Cst. Halaburda's familiarity with the availability of equipment in various locations in the area, and on the information supplied by Cst. Martens as to the availability of the appropriate equipment at Lorette, it was decided that the appellant would be taken to Lorette where the breath tests would be administered.

[4] Between 7:04 p.m. and the arrival of Cst. Halaburda and the appellant at the Lorette detachment at 7:24 p.m., the judge found that Cst. Halaburda was mindful of the importance of administering the breath tests as soon as practicable. Upon arrival at the Lorette detachment, Cst. Halaburda stated that he wanted to ensure that the appellant had exercised his right to counsel. As a result, at 7:26 p.m. he provided the appellant with a second opportunity to call counsel on a phone from the police detachment. The appellant spoke to counsel from 7:29 to 7:35 p.m.

[5] At 7:35 p.m. Cst. Halaburda learned that there was no breath instrument available for use at the Lorette detachment. He determined that the nearest available breath instrument was at the Steinbach detachment. Constable Halaburda and the appellant

left the Lorette detachment office at 7:38 p.m. and arrived at the Steinbach detachment shortly before 8:08 p.m. The total time spent at Lorette was 14 minutes.

[6] The observation period for the purposes of the test on the Intoxilyzer began at 8:08 p.m. at the Steinbach detachment. The first sample of the appellant's breath was received at 8:30 p.m. The instrument registered a reading of 90 mg%. The second sample of the appellant's breath was taken at 8:52 p.m., registering a reading of 80 mg%.

[7] The evidence of the two breath tests - 90 mg% and 80 mg% respectively - was provided at the trial of this matter by way of the certificate of a qualified technician and complied with all statutory requirements set out in s. 320.31(1) of the ***Criminal Code*** (the "***Code***").

[8] Constable Halaburda testified that he did not canvas the availability of all approved breath devices in the surrounding area at the commencement of his shift and relied on Cst. Martens' confirmation of an available instrument in Lorette. He also confirmed that the appellant did not request a second call to counsel upon arrival at Lorette, but stated that it was his practice to offer a call to counsel upon first arriving at the detachment and the appellant accepted his offer.

[9] At trial, the learned trial judge (the trial judge) considered the expert evidence of the appellant's witness and held him to be qualified to provide opinion evidence generally as it relates to the accuracy of Intoxilyzer readings. It was the expert's opinion that the breath instrument in this case has a well-known margin of error, and that this information

is provided in the instrument's published manual. This margin of error is 10 percent of the stated mg% test result.

THE DECISION OF THE TRIAL JUDGE

[10] The trial judge found that the Crown had proven its case beyond a reasonable doubt in respect of the 80 mg% charge, but acquitted him of the impaired driving charge as the accused did not demonstrate any indicia of impairment.

[11] In coming to his conclusion on the 80 mg% charge, the judge reviewed the evidence of Cst. Halaburda, finding that Cst. Halaburda and Cst. Martens discussed where they should take the appellant to administer the breath tests, and that Cst. Halaburda relied on both his familiarity with the local detachments and an external confirmation of an instrument in Lorette. The judge accepted that Cst. Halaburda was mindful of the importance of administering the breath tests as soon as practicable. Upon finding that there was no suitable instrument in Lorette at 7:35 p.m., he took the appellant directly to the Steinbach detachment.

[12] Looking at the entire chain of events, and specifically considering the reasonableness of Cst. Halaburda's decision to take the appellant to the Lorette detachment, the judge ruled that there were no unexplained delays in this case and that the breath tests were administered as soon as practicable.

[13] In respect of the breath test readings, the judge held that based on s. 320.31 of the ***Code*** the results of the appellant's breath analysis documented in the certificate were conclusive proof of his blood alcohol concentration at the time of the analysis. In

convicting the appellant of the 80 mg% charge, the trial judge determined that the evidence of the appellant's expert witness did not raise a reasonable doubt.

THE POSITION OF THE APPELLANT

i. The trial judge erred in finding that the appellant was "over the legal limit" beyond a reasonable doubt

[14] The appellant argues that since the approved breath device in this case has an acknowledged margin of error of 10%, it means that an 80 mg% reading from the device could be in fact as low as 72 mg%. Therefore, the evidence did not establish beyond a reasonable doubt that the appellant's readings were in fact 80 mg% or over at the time of the offence. The appellant argues that by relying on the presumption found at s. 320.31 of the ***Code*** in finding that the evidence demonstrated proof beyond a reasonable doubt, the trial judge misapprehended the evidence and erred in law in finding sufficient evidence to convict beyond a reasonable doubt.

ii. The trial judge erred in law in finding that the breath testing was done "as soon as practicable"

[15] The appellant argued at trial that a breath test is a warrantless search and seizure and failing to perform the breath testing "as soon as practicable" from the time of the offence and the test results, is a violation of s. 8 of the ***Charter of Rights and Freedoms*** (the "***Charter***").

[16] The appellant argues that the principal delay was caused by the police being unaware of where the breath testing equipment was located in their patrol area and the resulting requirement to attend at both the Lorette detachment and the Steinbach detachment. Further, the appellant argues once they were aware of the lack of

availability of a testing instrument, the police did not move with dispatch to get the appellant to a device.

[17] In summary, the appellant states that the following omissions or actions on the part of the officers were not reasonable and contributed to the failure to take the breath tests as soon as practicable:

i) By failing to turn their minds to where the nearest equipment was located at the onset of their shift;

ii) By Cst. Martens failing to advise Cst. Halaburda that no instrument was present when he arrived at the Lorette detachment ahead of Cst. Halaburda and the appellant;

iii) By Cst. Halaburda providing the appellant with a further opportunity to contact counsel when he arrived at the Lorette detachment after already having been provided with an opportunity to contact counsel at roadside;

iv) Despite the size of the Lorette office, Cst. Halaburda spent 17 minutes at the detachment before determining it did not have breath testing equipment available; and

v) The delay of a further period of time to transport the appellant to another police detachment.

THE POSITION OF THE CROWN

i) The trial judge did not err in finding that the breath demand was administered as soon as practicable

[18] The Crown states that the applicable principles governing the admissibility of the breath test results is set out in ***R. v. Fenske***, 2016 MBCA 117, [2016] M.J. No. 349 (QL), at para. 28 where the court held:

> **28** I would adopt Klebuc JA's summary of the "as soon as practicable" standard set out in *Vanderbruggen* (in *Burwell* at para 18):
>
> > (a) The phrase "as soon as practicable" means nothing more than that the breath samples be taken within a reasonably prompt time under the circumstances.
> >
> > (b) Where a demand for breath samples had been made, there is no requirement that the breath tests be taken as soon as possible.
> >
> > (c) The touchstone for determining whether the breath samples were taken as soon as practicable is whether the police acted reasonably.
> >
> > (d) The trial judge is to look at the whole chain of events, bearing in mind what occurred within the two-hour limit prescribed by the Criminal Code.
> >
> > (e) While the Crown is obligated to demonstrate–in all the circumstances–that breath samples were taken within a reasonably prompt time, there is no requirement that the Crown provide a detailed explanation of what occurred while the accused was in custody.

[19] The Crown submits that though the decision in ***Fenske*** was decided prior to Parliament's amendments to the relevant ***Code*** provisions, it remains good law and that the only material change since the introduction of s. 320.28 concerns the start of the chain of events, with the logical time to start the "as soon as practicable" assessment is from the time of arrest to the time of the last breath sample. (See ***R. v. Najev***, 2021 ONCJ 427, [2021] O.J. No. 4328, at para. 111)

[20] The Crown notes that the trial judge accepted Cst. Halaburda's evidence as credible and reliable, finding that there were no periods of unexplained delay throughout the chain of events. He found that the officer was continuously mindful of a need to

administer the breath tests promptly and that the officer's reliance on prior experience and external confirmation was reasonable.

[21] The Crown submits that the trial judge's finding that the breath tests were administered with reasonable promptness, meeting the as soon as practicable standard, was correct.

ii) Even if the breath test was not administered as soon as practicable, the admission of the breath test analysis would not bring the administration of justice into disrepute

[22] In view of my conclusions set out later in these reasons it is not necessary for me to summarize the Crown's position or to formally address this issue in my reasons.

iii) The trial judge did not misapprehend the evidence of the expert witness called by the appellant at trial

[23] In answer to the appellant's argument, it is the Crown's position that it is not necessary for the court to adjust downward by 10 percent the breath sample reading obtained from the appellant to account for the margin of error in the device approved by Parliament. The Crown relies on the decision of the court in ***R. v. Musey***, 2017 SKPC 46, [2017] S.J. No. 267, where the judge applies the decision of the Supreme Court of Canada in ***R. v. Moreau*** stating at para. 14:

> 14. … An expert in *Moreau* testified that the Breathalyzer used in that case was subject to a possible margin of error of 10 mg% more or less. The Supreme Court, however, did not accept this as evidence to the contrary, and said, in part, that no evidence would be evidence to the contrary when it only demonstrated "the inherent fallibility of the instruments which are approved under statutory authority". Most relevant to this case, was Justice Beetz's comments about the significance of Parliamentary approval of the approved instrument:
>
>> It seems to me that when Parliament provided for the analysis of breath samples by way of approved instruments, it was aware of the limitations inherent in all instruments. Parliament must be taken to have made allowance for these limitations in the provisions relating to the approval of certain kinds of instruments as well as in those setting the highest

> permissible level of alcohol in the blood at 80 milligrams in 100 millilitres of blood.

[24] The Crown argues that the trial judge weighed the expert's evidence appropriately and found that nothing in the expert's evidence undermined the appellant's breath analysis. The appellant did not challenge the legislative scheme generally and instead advanced an argument which Parliament has specifically addressed as a part of its 2018 overhaul of the ***Code***'s driving provisions. In particular, the Crown notes that s. 320.12(1)(c) of the ***Code*** is an explicit expression of Parliament's confidence in the underlying science of the breath sample testing regime.

[25] The Crown points out that this confidence is also expressed in s. 320.31 of the ***Code*** where Parliament establishes the testing preconditions at s. 320.31(a), (b) and (c). That provision provides:

> **320.31(1)** If samples of a person's breath have been received into an approved instrument operated by a qualified technician, ***the results of the analyses of the samples are conclusive proof of the person's blood alcohol concentration at the time when the analyses were made*** if the results of the analyses are the same — or, if the results of the analyses are different, the lowest of the results is conclusive proof of the person's blood alcohol concentration at the time when the analyses were made — if
>
> > **(a)** before each sample was taken, the qualified technician conducted a system blank test the result of which is not more than 10 mg of alcohol in 100 mL of blood and a system calibration check the result of which is within 10% of the target value of an alcohol standard that is certified by an analyst;
> > **(b)** there was an interval of at least 15 minutes between the times when the samples were taken; and
> > **(c)** the results of the analyses, rounded down to the nearest multiple of 10 mg, did not differ by more than 20 mg of alcohol in 100 mL of blood.
>
> (emphasis added)

[26] Based on the legislative provisions, the Crown submits there is no basis in the expert's evidence to interrupt this statutory process and that to do so would have been

an error. Accordingly, based on the standard of review applicable in respect of this issue, namely, whether the verdict is one that a properly instructed jury could have reasonably rendered, the trial judge's verdict is not only reasonable, but it was the only reasonable result.

DECISION

[27] Jurisdiction for the appeal is found under s. 813 (a)(i) of the ***Code***.

[28] The first two issues in this case involve a determination of ***Charter*** rights. The Manitoba Court of Appeal held that the applicable standard in respect of these two issues is correctness, holding in ***R. v. Farrah***, 2011 MBCA 49, 268 Man.R. (2d) 112 (QL) at para. 7:

> **7** By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:
>
> a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
>
> b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant* at para. 129).
>
> c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd*, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).
>
> d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the

> appropriate factors have been considered (see *Grant* at para. 86, and *R. v. Beaulieu*, 2010 SCC 7 at para. 5, [2010] 1 S.C.R. 248).

[29] The final point in issue involves a consideration of whether based on the evidence, the verdict was unreasonable or not. The standard of review in this context is whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered. (See ***R. v. Biniaris***, 2000 SCC 15, [2000] 1 S.C.R. 381)

[30] There is no disagreement by counsel in respect of the applicable standards of review.

[31] The trial judge correctly noted in his oral reasons that the Crown bears the burden of proving on a balance of probabilities that this warrantless search was authorized by law and was carried out in a reasonable manner. He further notes that a search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search was carried out is reasonable.

[32] In respect of the first issue, in my opinion the trial judge properly directed himself regarding the allegation that Cst. Halaburda breached the appellant's s. 8 ***Charter*** rights by failing to make the breath demand or obtain breath samples as soon as practicable. The trial judge stated in applying this principle that:

> The caselaw regarding the as soon as practicable principle clearly outlines that this requirement must be applied with reason. I would adopt the Court's summary of the as soon as practicable standard set out in *R. v. Vanderbruggen* …
> (See T100- Ruling on the Voir Dire – Trial Transcript)

[33] The trial judge held in his reasons that the phrase "as soon as practicable" means nothing more than that the breath samples be as set out in ***Vanderbruggen*** (as read):

> … taken within a reasonably prompt time under the circumstances. Where a demand of breath samples had been made, there was no requirement that the breath test be taken as soon as possible. The touchstone for determining – touchstone for determining whether the breath samples were taken as soon as practicable is whether the police acted reasonably.
>
> (See T101- Ruling on the Voir Dire – Trial Transcript)

[34] Having directed himself in respect of the law, it is my opinion that the trial judge properly considered the evidence before him and based on the evidence, he also properly concluded on the *voir dire* that none of the accused's s. 8 ***Charter*** rights were breached by the police. With the consent of counsel, the trial judge's findings on the *voir dire* were applied *mutatis mutandis* to the trial and the certificate of the qualified technician became evidence in the cause.

[35] In view of his conclusions in respect of the forgoing issue, it was not necessary for the trial judge to consider s. 24(2) of the ***Charter***. Since I have arrived at the conclusion that the trial judge applied the appropriate principles of law in coming to the conclusion that the certificate be admitted into evidence, it is also not necessary for me to consider the applicability of s. 24 (2) of the ***Charter***. However, if I had come to the conclusion that the breath demand was not made, or the breath tests were not administered, as soon as practicable, I would conclude, based on the arguments set out in the Crown's brief, that the admission of the breath test analysis would not bring the administration of justice into disrepute, and I would admit the certificate of the certified technician into evidence.

[36] In respect of the final issue, I find that there is no indication that the trial judge misapprehended the evidence of the expert produced by the appellant. The testimony

of the expert did nothing to undermine the reliability of the appellant's breath analysis. There is no evidence in respect of the approved instrument or its use in this case that suggests any error.

[37] Parliament has set out preconditions in s. 320.31 that, if met, amount to conclusive proof of the appellant's blood alcohol concentration at the time when the analyses were made. There was no challenge to the preconditions being established in this case and based on all the evidence before him, the trial judge rendered a verdict based on that evidence and a proper application of the law to the evidence.

[38] In conclusion, there is no basis for me to interfere with the decision of the trial judge. Accordingly, the appeal of the appellant is dismissed.

_____ J.