

Editor's Note: Addendum released May 9, 1997. Text of addendum  
appended to original judgment.  
Q.B.CR.AP. A.D.1993  
No. 20 J.C. B.

IN THE QUEEN'S BENCH  
JUDICIAL CENTRE OF BATTLEFORD

BETWEEN:

HER MAJESTY THE QUEEN

- and -

KELLY DALE BOYKO

K. Scott Bartlett

for the Crown

Peter Bruce Gunn

for the accused

JUDGMENT  
March 20, 1997

DAWSON J.

This is a Crown appeal from the acquittal of Kelly Dale Boyko (the "accused") on a charge of operating a motor vehicle while his blood-alcohol concentration exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to the provisions of s. 253(b) of the Criminal Code. The grounds for the appeal, as stated by the Crown are:

1. That the learned trial judge erred in law in holding that, after a demand under s. 254(2) of the Criminal Code of Canada, only an approved instrument can provide a Peace Officer with reasonable and probable grounds for a demand under s. 254(3) of the Criminal Code of Canada.
2. That the learned trial judge erred in law in holding that the admission of the Certificate of Analysis into evidence pursuant to s. 258(1)(e) of the Criminal Code of Canada would bring the administration of justice into disrepute.

The Crown has requested that the acquittal be set aside and a conviction entered.

## FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. At the trial of this matter Constable Watson testified as the only Crown witness. He testified that at 2:05 a.m. on March 20, 1993, he was on patrol, in a marked police vehicle, when he noticed a truck parked on the shoulder of a public highway. The constable testified that when he pulled behind the vehicle, the vehicle drove a distance of 15 or 20 metres and then stopped again. Constable Watson approached the vehicle and spoke with the accused, who was seated in the driver's seat. There was also a passenger in the vehicle. The constable testified that there was an odour of liquor coming from within the vehicle. Constable Watson testified that the accused displayed, what he described as "some signs of impairment", namely that the accused had red, bloodshot eyes and an odour of alcohol on his breath. The constable stated that the accused admitted he had been drinking earlier in the evening. The constable also noted that there was an open bottle of whiskey on the floor of the accused's vehicle and some unopened bottles of beer. In addition, a plastic cup containing a whiskey drink mixture was found on the floor of the vehicle, near the feet of the passenger.

The constable instructed the accused to get out of the vehicle. The constable then placed the accused in the rear of the police vehicle and made a demand to the accused that he provide a sample of his breath suitable for analysis into a roadside screening device. The accused complied. The constable described the instrument used on this occasion for the roadside breath tests as a model known as "J-Cal." The accused blew into the instrument six times. On the sixth blow, the "fail" light on the J-Cal machine was activated. The constable testified that the "fail" reading satisfied him that the accused was driving with more than eighty milligrams percent alcohol in his blood. The constable then made a demand that the accused supply samples of his breath suitable for analysis in a breathalyser instrument pursuant to s. 254(3) of the Criminal Code. It was conceded by the Crown that Constable Watson relied solely on the accused's failure to register a pass on the J-Cal instrument for his reasonable and probable grounds to make a breathalyser demand.

After making the demand for a breathalyser, the constable advised the accused of his rights to counsel. The accused indicated that he would comply with the breathalyser demand. The accused was transported to the R.C.M.P. detachment where he provided samples of his breath. Breathalyser readings were obtained and a Certificate of Analyses prepared. The Certificate of Analyses was tendered into evidence at trial. The Certificate of Analyses was the only evidence presented by the Crown as to the concentration of alcohol in the accused's blood.

The Approved Screening Devices Order following s. 254 of the Criminal Code provided that a number of devices had been approved by the attorney general for use as roadside

screening devices. The Crown conceded that the J-Cal device used by Constable Watson on the accused was not such an approved device. That is, the J-Cal was never approved by the attorney general for use as a roadside screening device.

The accused objected at trial to the admissibility of the Certificate of Analyses, arguing that its use should be suppressed under s. 24(2) of the Charter of Rights. The accused argued that the officer did not have reasonable and probable grounds to make the breathalyser demand because he had relied, for his grounds, on the results of a breath sample received into an unapproved screening device. As such, the accused argued, ss. 7, 8 and 9 of the Charter were violated.

The trial judge held that the accused's rights under s. 9 were violated. The trial judge held that as an unapproved instrument was used, the subsequent conduct of the police officer in relying on its results was not reasonable, but arbitrary. He held that the evidence obtained (the breathalyser test results) were obtained following an arbitrary detention. The trial judge stated that even if the officer believed that it was acceptable to use this J-Cal device, and he had no personal bad faith, the absence of good faith must be imputed to him because he used an unapproved device. The trial judge then went on to consider the requirements set out in *R. v. Collins*, [1987] 1 S.C.R. 265 for invoking a s. 24(2) remedy, and excluded the Certificate of Analyses.

#### POSITION OF THE CROWN AND THE ACCUSED

The Crown argues that the trial judge erred in excluding the evidence contained in the Certificate of Analyses. It argues that it was reasonable for the officer to rely on the reading he obtained from the J-Cal device, notwithstanding the fact that it was not approved for roadside breath tests. The Crown referred to the Saskatchewan Court of Appeal decision in *R. v. Arthurs* (1981), 63 C.C.C. (2d) 573 which held that it is not necessary for the Crown to establish in its evidence the accuracy of the roadside instrument in order to establish the reasonable and probable grounds for a breathalyser demand. The Crown also refers to *R. v. Seymour* (1986), 45 M.V.R. 132, wherein the Nova Scotia Supreme Court [Appeal Division] held that it is not necessary for the Crown to establish that the roadside screening instrument was an approved instrument in order for the Crown to establish the reasonable and probable grounds. The Crown argues that these two cases support the proposition that the officer here could rely on the J-Cal results for his reasonable and probable grounds despite the fact it was not approved. Further, the Crown argues that even if the court determines that the police officer did not have reasonable and probable grounds to make the breathalyser demand, the lack of reasonable and probable grounds is only one factor to be considered in determining whether there has been a Charter violation. The Crown argues that in this instance the admission of the Certificate of Analyses would not bring the administration of justice into

disrepute, but a failure to admit the Certificate of Analyses would do so.

The accused argues that because the J-Cal was not an approved device it was not an instrument that the constable could lawfully use to form the reasonable and probable grounds necessary to make a s. 254(c) breathalyser demand. The accused argues that without the requisite objective reasonable and probable grounds, the breathalyser demand, the detention of the accused for the purposes of obtaining the breath samples, and the taking of the samples constituted breaches of the accused's Charter rights. Therefore, he argues the Certificate of Analyses, being the evidence resulting from the breaches, should be excluded under s. 24(2) of the Charter.

#### ANALYSIS

Section 254(3) of the Criminal Code provides that a peace officer may demand that a person submit to a breathalyser test, if the officer has reasonable and probable grounds to believe that the person has committed an offence under s. 253. The first question to be determined is whether Constable Watson had the requisite reasonable and probable grounds to make a breathalyser demand on the accused.

Section 254(2) of the Criminal Code provides that a roadside screening device may be used as an investigative tool to provide peace officers with the reasonable and probable grounds necessary to make a breathalyser demand.

Section 254(2) expressly states where a police officer reasonably suspects that a person, who is operating a motor vehicle, has alcohol in his/her body, the officer may demand that the person provide a sample of his/her breath by means of an "approved screening device". Section 254(1) of the Criminal Code defines "approved screening device" as follows:

"approved screening device" means a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person and that is approved for the purposes of this section by order of the Attorney General of Canada.

The Regulations entitled "Approved Screening Devices Order" which follow the above definition, stipulate the machines which have been approved for the purposes of the section. The Saskatchewan Court of Appeal in *R. v. Arthurs*, supra, held that a "fail" result indicated by an "approved screening device" should, by itself, be sufficient reasonable and probable grounds to enable a peace officer to make a breathalyser demand. The court stated further that it was not essential for the Crown to prove the accuracy of an "approved screening device" to establish the reasonable and probable grounds. The Nova Scotia Supreme Court [Appeal Division] in *R. v. Seymour*, supra, held that the Crown is not required to produce evidence that the roadside screening device used to establish the grounds is an approved instrument or that it was functioning properly at the time of use. These authorities

presume that the results of such an "approved roadside screening device" are reliable.

Here, Constable Watson reasonably suspected that the accused had alcohol in his body. He made a demand pursuant to s. 254(2), and the accused provided a sample of his breath. The accused registered a "fail" on the J-Cal machine. Based on this "fail" reading, the officer made a breathalyser demand pursuant to s. 254(3). However, the sample of the accused's breath was not made into an "approved screening device" as required by the section. The J-Cal machine used was not an "approved screening device" as defined by the Criminal Code and regulations. Unlike the results from an "approved screening device" the results of the unapproved J-Cal device cannot be presumed to be reliable. Only a "fail" reading on an "approved roadside screening device", as defined by the section, can provide the necessary reasonable and probable grounds. Where the particular screening device used has been approved under the statutory scheme, an officer is entitled to rely on its accuracy. The test results on the J-Cal provided a result that has no meaning within the framework of the section. As stated by the trial judge:

The statute sets out what may be used to provide reasonable grounds for a demand and the cases have said that it is sufficient for a peace officer to rely on the device. But it must be a device which the courts can fairly conclude was approved for the purposes intended. . . .

The requirement of reasonable and probable grounds requires that an arresting officer must subjectively have reasonable grounds on which to base the arrest, and in addition the grounds must be justifiable from an objective point of view (R.v. Storrey, [1990] 1 S.C.R. 241). It was conceded that the "fail" reading was the only basis for the officer's grounds. Therefore, it is not necessary to examine the officer's other observations of the accused to determine if they provided reasonable and probable grounds. Even if the officer subjectively and honestly believed that it was appropriate to use the J-Cal machine, its use cannot be justifiable from an objective point of view. The J-Cal machine was not a machine approved for the purposes of assisting an investigating officer in establishing reasonable and probable grounds to make a breathalyser demand. I agree with the trial judge's finding that the "fail" reading registered on the J-Cal cannot provide the basis for the reasonable and probable grounds necessary to make the breathalyser demand.

Having determined that the officer lacked the reasonable and probable grounds to make a breathalyser demand, the questions then left to be determined are whether the accused's Charter rights have been infringed and whether the evidence obtained from such a violation should be excluded, pursuant to s. 24(2) of the Charter.

Whether or not a detention will constitute an "arbitrary detention" depends on the extent of the departure from the standard of reasonable and probable grounds, and the honesty of and the basis for the belief in existence of reasonable and probable grounds on the part of the officer. (See *R. v. Duguay, Murphy and Sevigny* (1985), 18 C.C.C. (3d) 289, affd on other grounds [1989] 1 S.C.R. 93). Herein the trial judge determined that the accused had been arbitrarily detained pursuant to s. 9 of the Charter. The trial judge found:

. . . I hold to the opinion that the use by the peace officer of a device he must be taken to have known was not approved cannot reasonably and objectively be said to have provided lawful grounds for the accused's further detention for breath samples.

. . .

The statute sets out what may be used to provide reasonable grounds for a demand and the cases have said that it is sufficient for a peace officer to rely on the device. But it must be a device which the courts can fairly conclude was approved for the purposes intended. If an unapproved instrument is used then it follows that the subsequent conduct of the peace officer in relying on it is not reasonable, but arbitrary. What transpired in this case was that following the roadside test the officer obtained further evidence (the breathalyser test results) which was obtained following an arbitrary detention. Moreover, even if the officer believed that it was acceptable to use the device he had in his patrol car and he had no personal bad faith, nevertheless absence of good faith must be attributed to him because of the device he used. . . .

Herein, the officer relied solely on the "fail" reading for the grounds for making the demand. As the "fail" reading was not reliable, there was a complete departure from the standard of reasonable and probable grounds. Further, in considering the honesty and the basis for the officer's belief in the existence of reasonable and probable grounds, one must be mindful of the fact that the officer had the benefit of the Criminal Code statute and regulations which stipulate what screening devices are approved for roadside tests. The officer must be taken to be aware of the Criminal Code requirements regarding such devices and he must be taken to be aware that his use of such devices is circumscribed by those requirements. I agree with the accused's submission that the comments of Sopinka J. in *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 at 209 are relevant:

In each of those cases, the police acted pursuant to express statutory authority that rendered the particular search lawful. The police are entitled, indeed they have a duty, to assume that the search powers granted to them by parliament are constitutionally valid, and to act accordingly. The

police cannot be expected to predict the outcome of Charter challenges to their statutory search powers, and the success of a challenge to such a power does not vitiate the good faith of police officers who conducted the search pursuant to the power. Where, however, police powers are already constrained by statute or judicial decisions, it is not open to a police officer to test the limits by ignoring the constraint and claiming later to have been "in the execution of my duties".

In the circumstances I agree with the trial judge's finding that the accused's Charter rights were infringed and that he was arbitrarily detained in contravention of s. 9 of the Charter.

Section 24(2) of the Charter provides for the exclusion of evidence where (a) it is obtained in a manner that infringes Charter rights, and (b) the admission of the evidence in the proceedings would bring the administration of justice into disrepute. A decision to exclude evidence on the grounds that it would bring the administration of justice into disrepute pursuant to s. 24(2) is a question of law. The test on appeal is whether the trial judge's decision to exclude the evidence was unreasonable. The Supreme Court of Canada in *R. v. Collins*, supra, also set out three sets of factors that must be taken into account in determining whether the evidence should be admitted pursuant to s. 24(2). Firstly, there are the factors which go to determining whether the admission of the evidence will affect the fairness of the trial. Secondly, there are the factors that demonstrate either the seriousness or the insignificance of the violation. And thirdly, there are those factors which are concerned with the effect of the exclusion of the evidence on the reputation of the administration of justice. Although the trial judge did not specify his findings with respect to these enumerated factors, he stated:

In my opinion the considerations outlined by the Supreme Court of Canada in *R. v. Collins* . . . for the invoking of a s. 24(2) remedy require that the results of the breathalyser test . . . be held inadmissible . . . .

I do not find that the exclusion of the evidence was unreasonable. Herein the evidence of the breathalyser results would not have been obtained but for the use of the unapproved J-Cal machine. It would affect the fairness of trials should officers be allowed to use unapproved roadside screening devices, the reliability of which has not been established to, and if the evidence derived from their unapproved use was to be admitted. Further, the breach of the accused's rights was a serious one. He was detained as a result of an unreliable test. And while it may be true that the police officer had no personal bad faith, as the trial judge stated, the absence of good faith must be imputed to the officer because of the use of such an unapproved device. Such unapproved use is an attempt to extend the prescribed provisions of the Criminal

Code to detain a person without reasonable grounds. For the Court to approve such an extension would bring the administration of justice into disrepute.

The appeal is accordingly dismissed.

J.

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May 9, 1997 ADDENDUM  
to Judgment dated March 20, 1997

DAWSON J.

Counsel for the accused has brought to the Court's attention the accused's request for costs on this appeal. Costs were argued at the time of the appeal, but due to an oversight were not addressed in the judgment.

Pursuant to Rule 343A(b) of The Queen's Bench Rules, I amend the judgment dated March 20, 1997, by awarding costs in favour of the accused and against the Crown, such costs to be fixed at \$1,000.00.

J.