

Court of Queen's Bench of Alberta

Citation: R. v. Caruth, 2004 ABQB 411

Date Filed: 20040607

Docket: 016665507S2

Registry: Wetaskiwin

Between:

Her Majesty the Queen

Respondent

- and -

Ronald Kenneth Caruth

Appellant

**Reasons for Judgment
of the
Honourable Mr. Justice D.A. Sirrs**

Summary Conviction Appeal from the judgment of the Honourable Judge K. Rostad dated the 3rd day of February 2004.

Jurisprudence

Hunter et al v. Southam Inc. [1984] 14 C.C.C. 97

R. v. Bernshaw 95 C.C.C. (3d) 193

R. v. Rilling 1975 24 C.C.C. 81

R. v. Schram No. 016204356P101001-02

Facts of incident

[1] At about 5:20 p.m., Cst. Kulbisky received an anonymous tip of an individual who had just left the beer gardens at the Sedgewick Recreation Centre, he was leaning on vehicles in the parking lot and she believed he was intoxicated. She watched the man get into a burgundy Chev truck, get back out, leave the truck door open, and go back into the beer gardens. She believed the man to be Ronnie Caruth.

[2] At 7:37 p.m., Cst. Kulbisky noted Mr. Caruth's vehicle parked in front of a liquor store in Sedgewick. The vehicle was a Chevrolet GM product half-ton pickup truck.

[3] He followed Mr. Caruth and noted that the vehicle was not fully on the right-hand side of the road. The driver's side tires were on the left side of the road.

[4] After going through an intersection, the vehicle did not accelerate for a short interval and then only accelerated to 35 - 40 kms./hr.

[5] Cst. Kulbisky stopped the vehicle without incident, approached the Chev half-ton and noted an odour of an alcoholic beverage inside the truck. He noted Mr. Caruth to slur his words.

[6] The Cst. did not think Mr. Caruth was intoxicated. Mr. Caruth's walk back to the police car was normal.

[7] In the police car, Mr. Caruth turned his head to the side, the result of which was his breath was directed away from Cst. Kulbisky. When Mr. Caruth turned towards him, Cst. Kulbisky noted his eyes to be bloodshot.

[8] Mr. Caruth admitted that he had been drinking beer.

[9] Upon taking the Alco-sur test, the Cst. noted a strong odour of alcohol.

Facts related to the Alco-sur device

[10] Cst. Kulbisky was a special constable in the employ of Flagstaff County, but by agreement with the RCMP, Cst. Kulbisky was under the supervision of the Killam Detachment of the RCMP.

[11] By his appointment by the Solicitor General of Alberta dated the 19th of April, A.D. 2001, Cst. Kulbisky's authority in part was ". . . to enforce the Criminal Code is restricted to arresting, detaining, and transporting impaired drivers . . ."

[12] On July 1, 2001, Cst. Kulbisky stopped a motor vehicle operated by Mr. Ronald Caruth. He noted that Mr. Caruth displayed some indicia consistent with impaired drivers; however, Cst.

Kulbisky was not satisfied that he had reasonable and probable grounds to arrest Mr. Caruth for impaired driving.

[13] It was only after Cst. Kulbisky obtained a sample of Mr. Caruth's breath into a roadside screening device which device indicated that Mr. Caruth failed, that the Cst. was satisfied he had the necessary reasonable and probable grounds.

[14] The roadside screening device was an Alco-sur, serial number 1031482, and had been purchased for \$100.00 from the Edmonton police service in May or June 1999. The second-hand device was then put into storage until June 22, 2001 and not used. The device was then taken by Cst. Kulbisky to the Killam RCMP Detachment where Cst. Archer performed the necessary tests to calibrate the device. Cst. Archer did not arrange for any maintenance of the device and records subsequently revealed that the device had not been maintained for approximately 7 years.

[15] Annual maintenance of the Alco-sur device had been a national policy of the RCMP since 1997.

[16] In January 2001, a bulletin was mailed from the Edmonton Forensic Laboratory to Alberta RCMP Detachments, including the Killam RCMP Detachment which contained in part:

2. Maintenance of Approved Instruments and Screening Devices

- a. This is a reminder that a policy is in place for the maintenance of approved instruments and screening devices (RCMP OPS Manual, Appendix II-6-11). *All approved instruments and screening devices in active use must be submitted to an authorized service centre for routine preventative maintenance, once per year.*
- b. In order to avoid challenges in this respect, your maintenance logs should show compliance with the policy. While your calibration checks may show that the instrument was functioning properly, it must be kept in mind that where established dates for calibration checks and maintenance are provided in policy, it is difficult to explain any non-compliance with any degree of credibility. For some, the cost of maintenance may be a concern, but at the same time, there is little point of having these instruments, if their condition is such that successful prosecutions are placed in jeopardy.

Issues

1. Did the trial judge err in finding that Special Cst. Kulbisky had the authority to administer a roadside screening of Mr. Caruth's breath?

[17] I am satisfied that Judge Rostad did not err in determining that incidental to Special Cst. Kulbisky's power to arrest Mr. Caruth for impaired driving, was the power to administer a roadside screening of a sample of Mr. Caruth's breath by use of an approved device.

2. Did the trial judge err in finding that the subjective and objective reasonable and probable grounds existed to make an evidentiary breath demand in this case?

Subjective Grounds

[18] I am satisfied that Judge Rostad was correct in determining that Cst. Kulbisky had the necessary subjective reasonable and probable grounds to demand that Mr. Caruth provide a sample of his breath suitable for analysis in an intoxilizer (a second breath sample). Cst. Kulbisky had attended a course on the use of the Alco-sur device in June 2001, which course qualified him to use the device. His training caused him to take the Flagstaff Alco-sur device to the Killam RCMP to be calibrated. At no time was he made aware that something in addition to the calibration of the device was necessary. He had an honest and reasonable belief that he could use the "fail" indication on the Alco-sur device test taken by Mr. Caruth to derive his reasonable and probable grounds that Mr. Caruth's ability to drive a motor vehicle was impaired by alcohol or that Mr. Caruth had more alcohol in his blood than was allowed by law.

Objective Grounds

[19] The Defence has objectively questioned the reliability of the roadside screening device based upon the fact that the device had not been maintained in accordance with RCMP policy.

[20] In this case, I am satisfied that Cst. Kulbisky had the requisite reasonable suspicion that Mr. Caruth had alcohol in his body to justify doing a search by way of obtaining a sample of Mr. Caruth's breath suitable for analysis by the roadside testing device.

[21] Both Judge Rostad, in the trial in this case, and Judge White, in *R. v. Schram*, concluded that without evidence to refute that the roadside screening device was not operating properly, a police officer is entitled to rely upon the results of the test. The problem as I see it, is that both Judge White and Judge Rostad place the onus upon the accused to satisfy the court that the roadside screening device malfunctioned.

[22] The appellant's application was by way of a **Charter** challenge, alleging that Mr. Caruth's s. 8 **Charter** rights were breached.

[23] In regards to the application of *R. v. Rilling* to this case as set out in paragraphs 41 and 42 of Cory J.'s judgment in *R. v. Bernshaw*, as this case involves a s. 8 **Charter** challenge, I have determined that his comments do not apply.

[24] The demand for a second breath sample is a search as defined by s. 8 of the **Charter**. As the search is done without a warrant, it is *prima facie* unreasonable. Thus, the burden of proof shifts to the Crown to satisfy the court on a balance of probabilities that the search is reasonable. The Crown must establish, pursuant to *Hunter et al v. Southam Inc.* that the search was authorized by law, the law itself is reasonable, and that the manner in which the search was carried out is reasonable.

[25] A demand for a breath sample is authorized by the **Criminal Code** and no issue is taken with whether the law is reasonable.

[26] The issue is whether on an objective basis, the demand for the second sample of Mr. Caruth's breath was carried out in a reasonable manner.

[27] The facts pertaining to this issue:

1. The Alco-sur device was second hand.
2. After purchase, the device was put in a storage cabinet for 2 years.
3. The device had not been sent for maintenance for approximately 7 years.
4. RCMP policy since at least 1998 required that the devices be sent to an authorized service centre for preventive maintenance once per year.
5. A blunt bulletin was sent to the RCMP detachments in Alberta in January 2001 emphasizing the importance of annual maintenance of the devices.
6. Cst. Kulbisky was supervised by the Killam RCMP Detachment. They knew of the annual maintenance requirement. Thus, Cst. Kulbisky ought to have known of the need for preventive maintenance.
7. Mr. Okamura, the Crown's expert from the Edmonton RCMP Forensic Laboratory, described the need for annual maintenance as largely a common sense quality control and that any good scientific program should have a maintenance component.

[28] Would an informed person, viewing the matter realistically and practically, having thought the matter through, be satisfied that the search (demand for the second sample) was conducted in a reasonable manner? In other words, in the circumstances, would it be reasonable

to rely upon the fail results of the Alco-sur device to form the requisite reasonable and probable grounds?

[29] First, on the facts of this case, I am satisfied that on an objective basis, Cst. Kulbisky did not have reasonable and probable grounds to make the demand of Mr. Caruth for the second sample without a fail result from the Alco-sur device.

[30] I am not satisfied there is a scientific basis to establish that the Alco-sur device required annual maintenance, but the Alco-sur needed to be maintained. In this case, the maintenance program was non-existent (calibration is not maintenance). It was so bad, in my opinion, no reasonable person would accept that the results of the Alco-sur test could be the deciding factor in providing Cst. Kulbisky with reasonable and probable grounds that a criminal offence had been committed. A reasonable person would expect that a device used by the police to conscript incriminating evidence, would be maintained.

[31] In my opinion, a reasonable person would expect that an Alco-sur would be sent to a qualified technician to be satisfied it was functioning properly before using it, knowing it had been in a storage cabinet for 2 years.

[32] Justice Cory's remarks at paragraph 19 of *R. v. Bernshaw* concerning the tragic effects and devastating consequences of drinking and driving lead to **Criminal Code** amendments "aimed at eliminating or at least reducing the problem," do not, in my opinion, justify the police failing to ensure that the equipment Cst. Kulbisky used to gather evidence was maintained to some minimum standard.

[33] The Crown has not met the onus of proving that on an objective basis, they conducted the warrantless search (demand for second sample) in a reasonable manner.

[34] As the impugned evidence, the fail result on the Alco-sur device, was conscripted evidence obtained from Mr. Caruth, it cannot be saved by section 24(2) of the **Charter**.

[35] Without this evidence, the Crown has failed to establish reasonable and probable grounds necessary to make the second demand, and thus they have not established the evidentiary basis necessary to enter the results of the second demand, i.e. the Certificate of Analyst.

Conclusion

[36] This appeal is allowed, the conviction is quashed, and I direct that an acquittal of Mr. Caruth be entered.

Heard on the 21st day of May, 2004.

Dated at the City of Red Deer, Alberta this 1st day of June, 2004.

D.A. Sirrs
J.C.Q.B.A.

Appearances:

Shannon Prithipaul (Gunn & Prithipaul)
for the Appellant

Ian Fraser (Wetaskiwin Crown)
for the Respondent