NOVA SCOTIA COURT OF APPEAL

Citation: R. v. LeClaire, 2005 NSCA 165

Date: 20051222
Docket: CAC 247254
Registry: Halifax

Between:

Kenneth Andrew LeClaire

Appellant

v.

Her Majesty The Queen

Respondent

Judges: Roscoe, Freeman, Cromwell, JJ.A.

Appeal Heard: November 9, 2005, in Halifax, Nova Scotia

Held: Appeal is dismissed per reasons for judgment of Roscoe, J.A.; Freeman and Cromwell, JJ.A. concurring.

Counsel: Michael S. Taylor, for the appellant
Daniel A. MacRury, for the respondent

Reasons for judgment:

[1] Following a trial in the Provincial Court, the appellant, Kenneth LeClaire, was convicted by Judge William Digby on a charge of refusing the breathalyzer contrary to s. 254(5) of the **Criminal Code**. The appeal is brought directly to this court on a question of law pursuant to s. 830 of the **Code.** The appellant submits that the trial judge erred by finding that the police officers had reasonable and probable grounds to make the breathalyzer demand and by relying on evidence obtained as a result of an unreasonable search.

[2] On October 24, 2004 at approximately 8:00 p.m. police received an anonymous tip about a possible impaired driver. The caller advised that she had seen a man staggering to a pick-up truck on Lake Drive in Bedford and drive away. A licence plate number was provided. The police ascertained the owner's name and address from the plate number and two officers in separate cars proceeded to that address on Basinview Drive in Bedford. They arrived a few minutes later and observed the truck with the plate identified by the caller parked diagonally in the driveway. The garage door was open. The officers could see that there was a door from the garage leading into the living area of the house. The door had a window in it and the officers observed that there was a light on in the room. They proceeded through the garage and saw a man inside. They knocked on the door and Mr. LeClaire, the appellant, opened the door. They indicated that they were investigating an impaired driving complaint and asked if they could come in. They were invited in. Observations of the appellant's physical condition led to the belief that he was intoxicated. The police read the appellant his rights to remain silent and his right to retain counsel. The appellant declined the offer to contact a lawyer.

[3] The officers advised Mr. LeClaire that they had been informed that a man who appeared to be intoxicated had been seen driving his truck on Lake Drive. They asked if he had been driving his truck and he acknowledged that he had driven it from the Roadhouse restaurant to Lake Drive and then home. He also admitted to having had a couple of beers at the Roadhouse. He said that he had been drinking after he arrived home and that he had been home for about 15 minutes.

[4] The officers asked the appellant what he had been drinking and he said "rum", whereupon he led them upstairs to the kitchen where he retrieved a bottle of rum from a cupboard. When asked where his glass was, he said "in the sink", but there were no glasses in the sink. Then he said, his glass was downstairs. There

were two glasses and a mug on a coffee table in the lower level room where the appellant had been when the police first arrived. According to the officers the mug contained dried coffee residue, one glass contained dried chocolate milk and the other glass had a clear liquid with bits of something floating in it. One officer said it did not smell like liquor, the other said it was water but smelled like alcohol.

[5] The police officers arrested Mr. LeClaire and read him the demand for a breath sample. He was taken to the police station where he telephoned and spoke to legal counsel. He refused to provide a breath sample.

[6] At the trial the defence alleged that the entry into the garage by the police was an unreasonable search contrary to s. 8 of the **Charter of Rights**. The trial judge ruled that the entry into the garage was an unreasonable search and that any information gathered by entering the garage would be excluded, “subject to a s.24(2) hearing.” However, he found that once the appellant gave the police permission to enter the house the search was no longer unlawful. At that point, he concluded that Mr. LeClaire had waived his right to privacy and that anything observed by the police was admissible. Since there was no complaint that the statements made by Mr. LeClaire were not voluntary or in violation of his right to remain silent or his right to counsel, they were also admissible.

[7] The defence also argued that the police did not have reasonable and probable grounds to make the breathalyzer demand because the police had no evidence that the appellant was impaired at the time he was driving. The trial judge rejected that argument. He stated:

> With respect to the charge of refusal, the evidence that Cst. Roach had on which he was entitled to act was the complaint which was relayed to him through dispatch which sparked the activity that he took. Mr. LeClaire, when seen by Cst. Roach, clearly evidenced signs of impairment, particularly motor impairment, from which one can conclude that his ability to drive a motor vehicle, when seen by the officer, was impaired by alcohol.
>
> The Defence position is, well, that was his state then, but that is no evidence as to his state when he was driving the vehicle by his own admissions some 20 minutes earlier. With the greatest of respect, I think Cst. Roach is entitled to take into account the complaint that he received as part of his reasonable grounds and that indicates that a male was operating a motor vehicle while impaired which would give Cst. Roach a basis for concluding on a

> reasonable and probable basis that Mr. LeClaire's state of impairment existed at the time that he was operating the motor vehicle by his own admission.
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> I find as a result that Cst. Roach had reasonable and probable grounds to make the demand and the demand was refused and I find him guilty.

[8] The trial judge found the appellant not guilty of impaired driving.

[9] There are two arguments made on appeal: that the trial judge erred in law by concluding that the unlawful entry into the garage was cured by later obtaining permission to enter the house and in finding that the officers had reasonable and probable grounds to make the demand for a breath sample.

1. Unreasonable search

[10] Although the trial judge found that the entry through the garage was an unreasonable search, I respectfully disagree with that determination. In my view the application of the case law to the specific facts of this case leads to the conclusion that proceeding through the open garage to knock on the door, in these circumstances, was not an unreasonable search.

[11] The analysis of this issue requires an examination of **R. v. Evans,** [1996] 1 S.C.R. 8. In **Evans**, the police, acting on an anonymous tip that the appellants were growing marijuana in their home, began the investigation by checking criminal records and electricity consumption and by doing a visual perimeter inspection. Those inquiries produced no evidence upon which to base an application for a warrant. The officers decided to go to the front door to question the occupants. They knocked on the Evans' front door, identified themselves and then because they smelled marijuana, arrested the appellants. They entered the house to ensure there were no other occupants and in the course of doing that they observed marijuana growing in the basement. With that information they obtained a warrant and returned to the house to perform a search.

[12] One issue before the Supreme Court was whether there was a breach of section 8 of the **Charter**. Justice Sopinka writing for the majority on that issue, explained that in order to decide whether there was a violation of the right to be secure from an unreasonable search, the first question is whether the police conduct was a search within the meaning of s. 8. Only an examination by police

that constitutes an intrusion upon an individual's reasonable expectation of privacy is a search for **Charter** purposes. [¶ 11]

[13] There is an implied licence for all members of the public, including the police, to approach a door of a residence and knock. (**Evans**, ¶ 13) If the police act in accordance with this invitation, there is no intrusion upon the privacy of the occupant. The purpose of the approach to the door is determinative of whether they have operated within the implied invitation to knock. If the purpose of the police officer is to simply communicate with the occupant in a normal manner, proceeding from the street to "reach a point in relation to the house where he can conveniently" do so, is permitted within the implied licence. As explained by Justice Sopinka :

> ¶ 15 In determining the scope of activities that are authorized by the implied invitation to knock, it is important to bear in mind the purpose of the implied invitation. According to the British Columbia Court of Appeal in *R. v. Bushman* (1968), 4 C.R.N.S. 13, the purpose of the implied invitation is to facilitate communication between the public and the occupant. As the Court in *Bushman* stated, at p. 19:
>
> > The purpose of the implied leave and licence to proceed from the street to the door of a house possessed by a police officer who has lawful business with the occupant of the house is to enable the police officer to reach a point in relation to the house where he can conveniently and in a normal manner communicate with the occupant.
>
> I agree with this statement of the law. In my view, the implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling. The "waiver" of privacy rights embodied in the implied invitation extends no further than is required to effect this purpose. As a result, only those activities that are reasonably associated with the purpose of communicating with the occupant are authorized by the "implied licence to knock". Where the conduct of the police (or any member of the public) goes beyond that which is permitted by the implied licence to knock, the implied "conditions" of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder.

[14] At ¶ 19 in **Evans** Justice Sopinka illustrated the difference between approaching a residence for the purposes of communication and investigation and approaching a residence to gather evidence by citing, with approval, the decision of the British Columbia Court of Appeal in **R. v. Campbell** (1993), 36 BCCA 204.

There, the police acknowledged that they had knocked on the accused's door not only to make inquiries as a follow up to the tip they had received, which was a proper investigative purpose, but the police were also trying to see if stolen furniture was visible through the open front door when the occupant answered the knock, which was an evidence gathering purpose.

[15] The **Evans** principle has been helpfully summed up by commentators. For example, Alan Gold, in *Search and Seizure Evidence*, ADGN/RP-028 (1997) said that **Evans** holds that police "knock ons" are searches where a residence is approached to see if evidence becomes apparent when the door is opened. Renee Pomerance, in *"Parliaments' Response to R. v. Feeney: A New Regime for Entry and Arrest in Dwelling Houses"* (1998) 13 C.R. (5th) 84 at ¶ 9 suggests that it is permissible for the police to approach a residence with a *bona fide* investigative inquiry and that the communicative nature of the activity takes it out of the realm of a search according to the principles in **Evans**. I agree with these statements.

[16] On the facts in **Evans**, Justice Sopinka concluded that not only did the police want to talk to the occupants, they also wanted to get a whiff of marijuana, that is, to secure evidence against them by obtaining the scent of marijuana from inside the house once the door was opened. Since occupiers cannot be presumed to invite police to enter upon their property with the specific purpose of substantiating a criminal charge, the police in **Evans** were found to have exceeded the authority implied by the invitation to knock and in so doing were engaged in a search. [¶ 16 - 21]

[17] The principles developed in **Evans** have been applied in several cases with facts similar to those in this case. I will review those most relevant.

[18] In **R. v. Van Wyk**, [1999] O.J. No. 3515 (C.J.), (appeals dismissed by brief endorsements: [2002] O.J. No. 3144 and [2002] O.J. No. 3145) the facts leading the police to the home of the accused were fairly similar to the matter under appeal. When investigating a highway accident, police were told by witnesses that the manoeuvres of a large truck had caused the accident. The truck was not involved in the collision and had left the scene. Using the plate numbers to determine his name and address, the police proceeded to the owner's residence. Their purpose was to find out who had been driving the truck. The truck was parked in the driveway and the police officers examined it with a flashlight. After knocking on the door, the

police were invited in by Mrs. Van Wyk. They spoke to Mr. Van Wyk, determined that he was the driver and then arrested him and informed him of his rights.

[19] At the trial before Justice Casey Hill, one issue was whether:

> ¶ 27 ... the authorities are entitled to pursue investigative questions, seeking further information, by warrantless attendance at a suspect's residence. The accused asserts that the police intruded upon his reasonable expectation of privacy by coming onto his property to his home without notice or permission.

[20] After referring to **Evans**, Justice Hill drew an important distinction between cases where the police knock on a door, with the intention of gathering evidence against the occupant by mere use of their senses, by taking a look or a whiff, and those cases where the intention is to ask questions to further the investigation. The difference is premised upon the ability of the occupant to refuse to answer the questions. He continued:

> ¶ 33 Where the sole purpose of the police officer is to ask questions of the homeowner, nothing can be gathered by the government, in the sense of unwitting disclosure by the occupant, until he or she chooses to speak. The police intent of facilitating communication, even investigative questioning, does not exceed the bounds of the implied right to approach and knock and is, accordingly, not trespassory or in breach of s. 8 of the Charter.

[21] Two further points emphasized by Hill, J. are also relevant to this case:

> ¶ 35 ... The implied licence to enter onto private property to knock on the door will generally import the requirement of a direct approach to the front door - not a trespassory detour elsewhere on the property to secure evidence. Secondly, the police have no jurisdiction to enter a dwelling-house unless admitted by an occupant with lawful authority to do so.

[22] Although the police were found to have breached Mr. Van Wyk's s. 8 rights because they gathered evidence with a flashlight before making their approach to the front door, since no additional evidence was obtained and there was no link between that breach and subsequent lawfully obtained evidence, no remedy was justified.

[23] The facts of **R. v. Petri** (2003), 171 C.C.C. (3d) 553 (Man. C.A.) are very similar to this case except that the police did not walk through the garage to knock

on the doors. The door was described as being “what appeared to be the primary entrance”. Justice Kroft described the purpose of the police approaching the door in the following passages:

> ¶ 20 ... at this point in time, the police had absolutely no more information about the identity of the erratic driver than they had when they first approached the house and the person who met them at the door was certainly not an accused. There was no reasonable ground on which to charge or arrest him. What the trial judge described as taking place inside the door was still nothing more than part of the continuing investigation conducted without coercion (for similar situations see R. v. Niles (1987), 85 N.B.R. (2d) 32 (Q.B.); and R. v. Van Wyk).
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> ...
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> ¶ 26 I must repeat that when the police officers first entered the accused's home, they were still engaged in an open-ended investigation based on the apparent invitation that had been given to them. They had no grounds for an arrest (warrantless or otherwise), and did not obtain reasonable grounds until they had observed the condition of the accused and until he had voluntarily acknowledged that he had just been the driver of the truck. Thus, the implied consent asserted by the Crown was simply the accused's consent for the police to enter his residence in the course of conducting an investigation, not for the purpose of making an arrest.
>
> ¶ 27 In any event, had the entire conversation occurred outside the doorway rather than a step or two inside, the grounds for arrest would still have crystallized only after the accused confirmed that he was the driver and the police had made note of his impaired condition. The officers could have made the arrest just as easily outside the doorway as inside on the landing. Thus, far from being the pivotal factual component in this case, the entry of the police onto the landing was quite incidental to the legal issues at play. The ultimate arrest was justifiable as a reasonably associated purpose arising out of the communications between the accused and the police in the course of an investigation conducted pursuant to an implied invitation and without suggestion of coercion.

[24] A different conclusion was reached in two Ontario cases where the police pursued suspected impaired drivers: **R. v. Noerenberg**, [1997] O.J. No. 4628 (Gen. Div.) and **R. v. Kaltsidis**, [2005] O.J. No. 3733 (Ct. J.). In **Noerenberg** the police received a tip that an impaired person was about to drive away from a hotel bar in an automobile. The police followed her to her home, where she opened the garage door with an automatic opener and drove into it. The police pulled into the

driveway, walked into the garage and confronted the accused. She was startled that they were there and then became belligerent and asked if they were allowed to come into her garage. Based on observations of her red eyes, unsteadiness, slurred speech and the smell of alcohol, the police arrested her for impaired driving and demanded that she provide a breath sample. In allowing the appeal from the trial judge, Lally, J., held that the police entered the accused's home without a warrant. The conscriptive evidence obtained in the garage was pursuant to an unreasonable search, and would not have been obtained but for the unreasonable search. It was therefore excluded.

[25] In **Kaltsidis** a police officer was responding to a report of erratic driving on a highway. He was trying to locate a cube van which was being followed by a citizen reporting on the van's movements by cell phone. After the van was spotted by the officer, he followed it for a few blocks before it was driven into a carport attached to a home. The police officer pulled in right behind the van, exited his vehicle and walked into the carport where the driver was standing next to the van. The officer said that the purpose of going into the carport was to investigate the physical status of the driver. He testified that he had noticed while he was still in his cruiser that the driver was unsteady on his feet as he exited the van. Upon entering the carport he noticed bloodshot eyes and an odour of alcohol. The officer agreed that as he walked into the carport he did not have reasonable grounds to arrest the driver for impaired driving. After questioning the driver about whether he had been drinking he asked him to accompany him to the cruiser. The driver protested saying he did not have to leave his own property. He was forcefully arrested and taken to the police station where breath samples were demanded. Justice Forsyth, relying on **Noerenberg**, decided that the accused was entitled to the same level of privacy in his carport as he would have inside his home. The officer was found not to be in hot pursuit and to have deliberately not stopped the driver while on the public road in the hope that he could gather more evidence of deviant driving. There was a breach of the accused privacy rights. The judge concluded:

> ¶ 114 ...Under these circumstances, it is my view that the only remedy for the breach of the accused's s. 8 Charter right in this case is to exclude the conscriptive evidence of the breath samples and also all of the observations of potential impairment by alcohol collected by PC Pincoe in the course of his intrusive investigation in the accused's carport. To do otherwise, in my view, would tend to bring the administration of justice into disrepute. Therefore, all such evidence is excluded.

[26] As noted above, the application of the principles set out in **Evans** to similar fact scenarios has produced divergent results. In my view, the two Ontario "garage" cases are distinguishable on the facts from this case. Although this case involves police entry into a garage, the similarities end there. The rationale underlying **Van Wyk** and **Petri** is of more assistance in this case.

[27] As Justice Sopinka emphasized in **Evans**, an important factor in this type of case is the purpose for the attendance of the police. There is an implied invitation to the public to approach a door of a house to knock on it. If the police do not exceed the extent of the implied invitation, they do not intrude upon the privacy of the occupant. If the purpose is to simply communicate with the occupant, there is no breach of the privacy right. So for example, if the police approach the door with the intent of selling tickets for a charity event, there would likely be no encroachment upon privacy rights.

[28] As can be seen from the cases summarized above, the line can be difficult to draw when the police are pursuing a driver or investigating an impaired driving complaint. In **Evans** the intent was to secure evidence against the occupants by smelling the air inside the home. That exceeded the implied invitation. In **Van Wyk** the intention was to identify the driver of the truck that caused the accident. That was found to be within the invitation to knock. As noted by Justice Hill (¶ 26) the police have an obligation to investigate crimes, and it is an appropriate exercise of that function to ask questions of people, including suspects, to determine the identity of a perpetrator. In **Petri**, the officers were found to be just beginning their investigation into a complaint of erratic driving. As in this case, having been given the licence plate number, they proceeded to the registered owner's home. But in both **Petri** and this case, the officers had limited information. As stated by Justice Kroft at ¶ 5 of **Petri**:

> ...They had no description whatsoever of the person who had been driving the truck; did not know if the house was the driver's home; and had no idea whether the erratic driver was the truck owner, a family member or an unrelated third person. Furthermore, they had no way of knowing if the driver was even in the house and did not know anything about his state of sobriety. They were in fact just beginning the investigation of a reported offence.

[29] In this case the officers were clear in their evidence that they were conducting an investigation of an impaired driving complaint. Their purpose is indistinguishable from that of the officers in **Van Wyk** and **Petri** cases.

[30] The next part of the analysis requires an examination of where the implied invitation to knock may be lawfully exercised. In **Evans**, Justice Sopinka indicated that the invitation extends to the point where a person can conveniently knock on the door. Justice Hill stated that the implied licence will require a "direct approach to the front door, not a trespassory detour elsewhere on the property to secure evidence." In **Petri** the officers knocked on "what appeared to the primary entrance to the residence".

[31] In this case the police officers testified that there were no lights on upstairs and that it appeared that the path to the door of the living quarters, where they could see a light, led through the garage. By proceeding through the open garage to knock on the door leading into the residence, they progressed "to the point where a person can conveniently knock on the door". By walking through the garage they were making a "direct approach" to the door apparently used by the occupants to enter the dwelling, not conducting a "trespassory detour" elsewhere on the property to secure evidence.

[32] The **Noerenberg** and **Kaltsidis** cases where the suspects were followed into their garages by the police are entirely distinguishable from the facts in this case. Since Mr. Kaltsidis and Ms. Noerenberg were personally present in their garages with the doors open, the police did not stop to knock. The police in those cases just walked right in without asking any permission. Therefore the drivers had no opportunity to choose not to answer the knock on the door or to refuse to be observed or engaged in conversation. Unlike in the present case, the police in those cases were able, by entering into the garages, to obtain relevant evidence about the condition of the drivers without first asking permission to enter. Another difference is that in both of those cases the suspects objected to the presence of the police in their garages. There was obviously no implied invitation to enter or an explicit invitation like the one extended by Mr. LeClaire in response to the knock. Any implied invitation to enter the garage in **Noerenberg** and **Kaltsidis** was clearly and expressly retracted.

[33] Conversely, the entry into Mr. LeClaire's garage was innocuous. The open garage was like an extension of the driveway, forming part of the approach to the

door. No evidence was secured by walking through the garage to knock on the door.

[34] I therefore conclude that in the circumstances of this case, the conduct of the police did not amount to a search within the meaning of s. 8 of the **Charter**, because their purpose when they went onto the property of the appellant was to investigate the commission of an offence, not to specifically gather evidence to use against the appellant. Furthermore, on these facts, the entry through the garage in order to access a door on which to knock did not exceed the authority implied by the invitation to knock and therefore did not infringe on the appellant's reasonable expectation of privacy. I would dismiss this ground of appeal.

[35] Although I would dismiss this ground of appeal, I emphasize that it is for different reasons than those given by the trial judge. I do not agree that if the walk through the garage had been properly categorized as an unlawful search, the actions of Mr. LeClaire in permitting the officers to come into his home should be considered to be a waiver of his right to privacy. I would respectfully disagree with the conclusion that the evidence supports a finding that the consent to enter the home was both voluntary and informed as required by the case law on waivers. See: **R. v. Wills** (1992), 70 C.C.C.(3d) 529 (Ont. C.A.).

2. Reasonable and Probable Grounds:

[36] The appellant submits that the trial judge erred in finding that the police officers had reasonable and probable grounds to make a lawful demand for a breath sample.

[37] The relevant sections of the **Code** are:

> 254 ...
>
> (3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

> (a) such samples of the person's breath as in the opinion of a qualified technician, or
>
> ...
>
> (5) Every one commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under this section.

[38] It is well settled that Section 254(3) requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief. In **R. v. Bernshaw,** [1995] 1 S.C.R. 254, Justice Sopinka, for the majority put it this way:

> 48 The *Criminal Code* provides that where a police officer believes on reasonable and probable grounds that a person has committed an offence pursuant to s. 253 of the *Code*, the police officer may demand a breathalyzer. The existence of reasonable and probable grounds entails both an objective and a subjective component. That is, s. 254(3) of the *Code* requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief: *R. v. Callaghan*, [1974] 3 W.W.R. 70 (Sask. Dist. Ct.); *R. v. Belnavis*, [1993] O.J. No. 637 (Gen. Div.) (QL); *R. v. Richard* (1993), 12 O.R. (3d) 260 (Prov. Div.); and see also *R. v. Storrey*, [1990] 1 S.C.R. 241, regarding the requirements for reasonable and probable grounds in the context of an arrest.

[39] The appellant submits that the trial judge erred in law in concluding that the officers in this case had the objective grounds for believing that the appellant was impaired while driving his vehicle. Although his impairment while being questioned in his home was readily apparent, it is argued that the officers had no grounds upon which to base a belief that he was impaired while driving at some earlier time. The appellant says the officers were not experts on the effects of alcohol on the body and its rates of absorption and elimination. Furthermore, the evidence of the staggering was third hand hearsay and anonymous.

[40] Counsel for the respondent submits in his factum that the evidence which established reasonable and probable grounds is abundant:

> 1) an anonymous tip of impaired driving;

2) the Appellant admitted that he had been drinking;

3) the Appellant admitted that he had been driving;

4) the Appellant had a strong smell of alcohol;

5) the Appellant was unsteady on his feet;

6) the Appellant had glossy eyes; and

7) the Appellant's speech was slurred.

[41] In my view, the trial judge did not err in finding that the police had reasonable and probable grounds to demand the breath sample. There was ample evidence upon which to conclude that the police officer subjectively had an honest belief that Mr. LeClaire had committed the offence of impaired driving and objectively there were reasonable grounds for this belief.

[42] The fact that part of the bundle of information available to the officers was hearsay arising from an anonymous tip is not material. As noted by McClung, J.A. in **R. v. Musurichan** (1990), 56 C.C.C. (3d) 570 (Alta. C.A.) at p. 574:

> The important fact is not whether the peace officer's belief, as a predicate of the demand, was accurate or not, it is whether it was reasonable. That it was drawn from hearsay, incomplete sources, or that it contains assumptions, will not result in its legal rejection by resort to facts which emerged later. What must be measured are the facts as understood by the peace officer when the belief was formed: *R. v. Hitchner* (1989), 92 A.R. 395, 13 M.V.R. (2d) 37, 6 W.C.B. (2d) 356 (C.A.); *R. v. Biron* (1975), 23 C.C.C. (2d) 513, 59 D.L.R. (3d) 409, [1976] 2 S.C.R. 56. Leading Constable Joseph to his belief was the understanding he held about the accident and the time it happened from exchanges he overheard on the police radio frequency. (If he was not accurate in his assessment of that information it must be remembered that he was not involved in its investigation. Nor would he have had any reason to anticipate the hit-and-run driver surrendering himself.) He observed Musurichan to have signs of moderate impairment. As well, Musurichan told him that he was the driver involved and that while he had taken moderate amounts of alcohol before the accident, he had taken nothing after it.

See also: **R. v. Stongquill** (1978), 43 C.C.C. (2d) 232 (Sask. C.A.) and **R. v. Eliuk**, [2002] A.J. No. 474 (Alta. C.A.), ¶ 12.

[43] The appellant also submits that the officers lacked evidence to support their belief that the appellant was impaired at the time he was driving. When questioned about whether the appellant might have been impaired as a result of drinking after his arrival in his home, Constable Roach testified:

> ...at this point I believe the information provided by Mr. LeClaire, that he was in operation of the motor vehicle 20 minutes prior to our arrival. Did I have any observations of him within, you know, driving that vehicle and his condition at the time. No, I did not but – just in my experience of dealing with impaired drivers and then being a breathalyzer technician and whatever training I have and I'm certainly not an expert in it but I know sometimes for people to reach a certain intoxicated state that it takes, you know, a while to get to that point. So in my own mind at that time I have a legitimate belief that he would have been impaired at the time of the – that he was driving a motor vehicle 15 minutes – 15 to 20 minutes prior to our arrival.
>
> However, to clarify the answer to your question, I did not have any direct observations. I'm only stating what was going through my mind at the time. (Page 76 AB)

[44] Judge Digby, as noted in ¶ 7 herein, accepted that the officer was entitled to rely on his own opinion of Mr. LeClaire's sobriety at the time of talking with him as a basis for believing that he was impaired at the time of driving. Although the officer's opinion would not be sufficient evidence upon which to base a conviction for impaired driving, I agree with the trial judge that the officer is able to rely on his own judgment and past experience when determining whether he has reasonable and probable grounds. As stated in **Musurichan**, the officer is entitled to make certain assumptions based on his observations of the suspect. Although Mr. LeClaire told the officers that he had been drinking since arriving home, the officers were entitled to evaluate the validity of that statement in the context of the other evidence relating to the glasses.

[45] Further support for this conclusion can be found in **R. v. Oduneye**, [1995] A.J. No. 632 (C.A.) where the court ruled that it was not necessary that the grounds on which the officer believed the accused to be impaired be limited to only those matters provable in court, but it was sufficient to be a belief based on circumstances known to the police officer at the time the demand was made. The

court approved the statement made by Kerans, A.C.J.D.C. (as he was then) in **R. v. Kissen,** [1978] A.J. No. 266:

> ¶ 3 The question is whether or not, without more, it can be said that the Crown has established that he acted on reasonable and probable grounds. The learned trial judge said that he did; I agree with the learned trial judge. It is not necessary that the grounds relied upon by the officer be limited to those matters which are provable in Court. It is sufficient that he have belief in grounds that were, in his circumstances on the roadside, reasonable and probable.

[46] After citing **Kissen**, the court in **Oduneye** concluded with respect to the grounds in that case:

> ¶ 23 ...It may be that reasons other than impairment existed for the physical symptoms and the conduct. However, the question is not whether the Crown has proven guilt beyond a reasonable doubt, but whether the facts as understood by the peace officer at the time he formed the belief, viewed objectively, constituted reasonable and probable grounds.

[47] I am not satisfied that the trial judge in this case committed any error in concluding that the officer had reasonable and probable grounds to make the demand for a breath sample. The information giving rise to the reasonable and probable grounds included the admission by Mr. LeClaire that he had been driving a few minutes before, that he had a few beers before he drove, that he was very likely the person seen by the informant to be staggering, and the numerous physical indicia of impairment, including slurred speech, unsteadiness, glossy eyes, and a strong smell of alcohol. These factors, coupled with the officer’s understanding that it takes time to get that drunk, established reasonable and probable grounds that Mr. LeClaire was impaired at the time of driving.

[48] For these reasons, I would dismiss the appeal.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.