Date: 2012 07 19
Docket: CR 2011000186

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PAUL PETRIN

Applicant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] Paul Petrin was convicted in Territorial Court of operating a motor vehicle with a blood alcohol level exceeding .08. He received a driving suspension of eighteen months and a fine.

[2] Two lines of defence were advanced at the trial. The first was that the breath samples were not taken "as soon as practicable" after the offence was allegedly committed. The second was that Mr. Petrin has a condition called acid reflux which, in turn, brought stomach alcohol into his mouth and caused the breathalyzer to give an inaccurate reading. Expert evidence was called in support of this.

[3] Mr. Petrin appeals on the basis that the trial judge erred in finding that the breath sample was taken "as soon as practicable" and in her treatment of the expert's evidence. He also appeals the sentence.

Were breath samples taken as soon as practicable?

[4] Section 258(1)(c) of the *Criminal Code* sets out a number of requirements which, if met, are conclusive proof that the blood alcohol concentration at the time the samples are taken is the same as at the time of the alleged offence. Among these is a requirement that samples be taken "as soon as practicable" after the offence is alleged to have occurred. Mr. Petrin argues that the trial judge erred in finding that breath samples were taken "as soon as practicable". For reasons that follow, I find that the trial judge did not err.

[5] Whether breath samples have been taken as soon as practicable is a question of fact. *R. v. Vanderbruggen* (2006) CanLII 9039 (ON CA). Unless there is a palpable and overriding error, the trial judge's findings on this point must be upheld. *R. v. Lee*, 2010 ABCA 1.

[6] The trial judge made a number of factual findings relevant to this question. These are not in dispute.

[7] At approximately 9:17 p.m. on December 4, 2010, Constable MacEachern of the Royal Canadian Mounted Police made a demand to Mr. Petrin to provide a breath sample through a roadside screening device. This was taken at 9:21 p.m. and registered as an "F", leading Constable MacEachern to conclude that Mr. Petrin's blood alcohol concentration was over the allowable limit. He arrested Mr. Petrin and read a formal breath demand to him.

[8] It took about ten minutes to drive from where the truck was stopped to the detachment. This included a two-minute detour to drive by Mr. Petrin's shop at his request, so he could ensure his daughter had returned safely from a snowmobile outing.

[9] Upon arriving at the detachment, Mr. Petrin was searched. He was then advised of his right to contact counsel. Mr. Petrin first indicated that he did not wish to speak with counsel, but then changed his mind after Constable MacEachern urged him to consider the seriousness of the situation.

[10] Mr. Petrin spoke with a lawyer in private and then used the washroom. Then he was turned over to a technician who took breath samples at 10:06 p.m. and 10:25

p.m. Both samples showed Mr. Petrin's blood alcohol concentration exceeded the legal limit.

[11] Mr. Petrin's position is that the breath samples were not taken as soon as practicable. He contends that there was insufficient evidence presented on how long it took for each of the search, the bathroom break and the call to counsel. Mr. Petrin also argues that Constable MacEachern's actions in encouraging him to speak with counsel prior to the breath samples being taken caused unacceptable delay.

[12] The applicable legal principles are summarized in *R. v. Vanderbruggen, supra*. The Crown is not required to provide a minute-by-minute account of what happened between when the accused is first detained and when the breath sample is taken. Rather, it must show that the samples were taken within a reasonably prompt time. In determining this question, the trial judge must consider the whole sequence of events and apply the "as soon as practicable" requirement with reason.

[13] A key argument advanced by Mr. Petrin is that the trial judge did not consider relevant case law he submitted about how police insistence that an accused exercise the right to counsel effects the issue of whether breath samples are taken as soon as practicable. He points to *R. v. Melitzer,* [1998] O.J. No. 1302 (Ont. Ct. J., Prov. Div.) and *R. v. Hesketh,* [2003] B.C.J. No. 1242 (Prov. Ct.). In both cases, the courts found that there had been unreasonable delay in taking breath samples as a result of the police insisting the accused speak with counsel before the sample was taken.

[14] Neither *Melitzer* nor *Hesketh* create a hard and fast rule that where the police probe more deeply into a waiver of the right to counsel a finding of unreasonable delay will invariably result. Further, the principles summarized in *Vanderbruggen* do not include a requirement that the circumstances under which the right to counsel is exercised undergo separate analysis. It is but one part of an entire sequence of events that must be taken into account in determining if the breath samples were taken as soon as practicable.

[15] *Melitzer* and *Hesketh* can be distinguished from this case on their facts.

[16] In *Melitzer* the accused confirmed he understood the right to counsel, but waived it unequivocally. Nevertheless, the officer placed a call to the duty counsel and left a message. Counsel returned the call some fifty minutes later and spoke to

the accused. It was only after this that breath samples were taken. Jennis, R.E. Prov J., found that this was a delay that required explanation and the *only* explanation was that the police were waiting for duty counsel to call. The judge found the delay unreasonable.

[17] In *Hesketh,* the officer testified that he was "absolutely certain" the accused understood his right to speak with counsel when he waived his right to do so. Nevertheless, the officer continued to question him on this. Mr. Hesketh did not change his mind, nor did he request that counsel be called. The police officer contacted duty counsel on his own and breath samples were delayed until after Mr. Hesketh spoke to the lawyer. This caused a thirty-one minute delay. Again, the delay was found to be unreasonable.

[18] The evidence about Mr. Petrin's decision to contact counsel came from Constable MacEachern. He testified that Mr. Petrin said twice he did not want to speak with a lawyer, but he changed his mind after Constable MacEachern suggested that, given the "seriousness of the ramifications of an impaired operation that he speak to counsel". *(Trial Transcript, page 16)*. In contrast to the situations in *Melitzer* and *Hesketh,* Mr. Petrin *agreed* and Constable MacEachern called legal aid at Mr. Petrin's request.

[19] Mr. Petrin's lawyer emphasized that the decision to exercise the right to counsel is for the accused alone. It is well-established, however, that a waiver of the right to counsel is only effective where it is "premised on a true appreciation of the consequences of giving up that right." *R. v. Clarkson* [1986] 1 S.C.R. 383, at para 20. In this case, Constable MacEachern took steps to ensure that Mr. Petrin appreciated the seriousness of his circumstances before he waived his right to counsel. There was a solid basis from which the trial judge could conclude that Constable MacEachern's actions were, as she described them, "prudent" and did not cause unreasonable delay in taking the breath samples.

[20] The trial judge made no overriding or palpable error in her conclusion on this point. It is clear from her reasons that she considered carefully the entire sequence of events and the total time it took to take the breath samples. Accordingly, her decision on this point must remain undisturbed.

Did the Trial Judge Err in her Treatment of the Expert's Evidence?

[21] The presumption in s. 258(1)(c) that the blood alcohol concentration at the time the breath sample is taken is the same as at the time the offence allegedly occurred can be displaced by "evidence tending to show" the following: that the breath testing device was malfunctioning or was operated improperly; that the malfunction or improper operation resulted in a determination that blood alcohol concentration exceeded .08; and that the blood alcohol concentration would not in fact have exceeded .08 at the time the alleged offence was committed.

[22] The court need not be "convinced" of the malfunction or improper operation of a breath testing device. It is necessary only to raise a reasonable doubt. *R. v. Gibson,* [2008] 1 S.C.R. 397, at para 7.

[23] The defence produced an expert witness, Dr. Jerry Malicky, who holds a doctorate degree in pharmaceutical chemistry. The intention was that Dr. Malicky would give expert testimony on the absorption and elimination of alcohol in the human body, the theory and operation of breath-testing devices to determine blood alcohol concentrations, and the effects of acid reflux on breath-testing device results.

[24] Following a *voir dire*, however, the trial judge determined that Dr. Malicky was not qualified to give expert evidence on the effects of acid reflux on breath testing devices. He was able to give expert evidence on the absorption and elimination of alcohol in the human body, the operation of the Borkenstein breathalyzer and the Intoxilyzer 5000 c, and the effect of mouth alcohol on breathalyzer results.

[25] Dr. Malicky prepared a report prior to the trial that was based on information he received about, among other things, Mr. Petrin's height and weight. The report was tendered into evidence and contained the following conclusion:

> If Mr. Petrin had alcohol in his stomach and it was refluxed into his esophagus or mouth at or near the time of testing, the results would have been higher than his actual blood alcohol concentration. This is a possible explanation for the discrepancy between the measured and my calculated values.

[26] The trial judge accepted Mr. Petrin's evidence that he has acid reflux. Mr. Petrin also testified that he was suffering from symptoms of acid reflux on the night he was arrested and that he consumed four ounces of alcohol earlier that day. He

did not recall what kind of alcohol he drank, nor did he know what the alcohol content was.

[27] The trial judge gave very little weight to Dr. Malicky's evidence and Mr. Petrin argues that she erred in doing so. In particular, he says she erred in her assessment of credibility and the weight she assigned to his evidence, in her treatment of his evidence on acid reflux and by making certain comments on elimination and absorption rates. I will deal with each of these in turn.

a. Credibility and Weight

[28] Findings on credibility must remain undisturbed unless it is shown that there was an overriding and palpable error. Mere disagreement with the conclusions reached is not enough. *R. v. Gagnon,* 2006 SCC 17, at para. 10.

[29] Findings on credibility bear directly on weight. In my view, the trial judge did not err in assessing Dr. Malicky's credibility, nor in the weight she assigned to his evidence as a result of her findings on credibility, as well as on qualifications. The trial transcript reveals an ample basis for her conclusions.

[30] The trial judge expressed a number of concerns about Dr. Malicky as a witness. She found that he was not a careful witness; that his evidence was "at times over-stated, perhaps exaggerated, or without foundation"; that he was "nonchalant" in his attitude, especially with respect to his education and experience; that he did not keep current with respect to the literature on acid reflux; and that he had no professional development in the area of acid reflux.

[31] The trial judge expressed significant concern that Dr. Malicky had sworn an affidavit in the proceedings where he deposed that he had in the past been qualified as an expert on the effects of acid reflux on breath testing devices. This was directly at odds with his testimony in the *voir dire* where he indicated that he had, in fact, *never* been qualified in that area.

[32] Mr. Petrin argued that the trial judge placed too much emphasis on the fact that Dr. Malicky is not a medical doctor, but rather a doctor of pharmacy. He contends she used this to devalue Dr. Malicky's evidence.

[33] In my view, the trial judge did not err in the amount of emphasis she placed on this factor. Indeed, her comments provided context, in addition to the other concerns that she expressed, to help explain why she placed so little weight on his evidence. She was entitled to take Dr. Malicky's qualifications - and lack of medical qualifications - into account in determining the weight to give his evidence.

[34] It is suggested that Dr. Malicky may not have had sufficient time to prepare before being called to testify, as he was not scheduled to testify at the trial. The defence had instead sought to tender Dr. Malicky's report under s. 657.3(1) of the *Criminal Code*, which allows an expert report to be tendered into evidence, without the expert appearing and giving testimony. This is, however, conditional on the court recognizing the witness as an expert and the court may still require the attendance of the witness.

[35] Considering the express provisions of s. 657.3(1) the possibility that the trial judge would not recognize Dr. Malicky as an expert in some or all of the areas for which he was proffered, or that she might require his attendance for examination and cross-examination on the report, should not have come as a surprise. Moreover, having more time to prepare would not, presumably, change Dr. Malicky's education and professional experience and the trial judge would have identified the same issues with them. The conflict between the affidavit and Dr. Malicky's testimony would have remained as well. In short, it would have made no difference.

[36] Mr. Petrin submits that the trial judge erred in failing to give sufficient weight to Dr. Malicky's written report.

[37] Before any weight can be given to an expert's opinion, the facts on which it is based must be established. *R. v. Lavallee,* [1990] 1 S.C.R. 852. Dr. Malicky's conclusions were based on hearsay about Mr. Petrin's physical characteristics, including height and weight as well as how much he said he had to drink. His height and weight were not placed in evidence, however, and so facts upon which it was based were not established. Accordingly, the trial judge did not err in assigning no weight to the conclusions in the report.

[38] Mr. Petrin also argues that the trial judge erred in referring to her own knowledge of the Widmark formula, as follows *(R.v. Petrin*, 2011 NWTTC 21, at para. 44):

> Further, Dr. Malicky's evidence was based on certain assumptions or "understandings". Dr. Malicky's report estimates what Mr. Petrin's blood alcohol content would have been based on these "understandings" using the updated Widmark formula. Though Dr. Malicky did not testify as to what the updated Widmark formula was, I know that the Widmark formula takes into account a person's weight in predicting his or her blood alcohol level. I do not know what Mr. Petrin's weight was on December 4, 2010. However, this being said, it is not this absence of evidence that I base my reasons on, but on the absence of evidence of the effects of acid reflux or as referred to in *R.* v. *Lynch, the biological phenomena* caused by in that case gastroesophageal reflux, on the operation of a breathalyzer, or analysis of the blood alcohol content of a person with such condition.

[39] Mr. Petrin's counsel is correct in pointing out that it is improper for a judge to bring personal knowledge, not in evidence, into a decision. However, the trial judge's own knowledge of the Widmark formula had no bearing on the outcome of the case. The Widmark formula related to Dr. Malicky's report and his evidence of alcohol absorption and elimination. The trial judge gave no weight to that report. The trial judge also included an express *proviso* that the lack of evidence on the Widmark formula did not play part in the decision. In the circumstances, I cannot conclude that her comments amount to an error.

b. Characterization and Treatment of Acid Reflux Evidence

[40] Mr. Petrin argues that the trial judge focused too closely on the frailties of Dr. Malicky's qualifications and knowledge of acid reflux and, in doing so, misapprehended the evidence tendered through Dr. Malicky. Dr. Malicky, he says, was qualified as an expert to give evidence on the effects of mouth alcohol on breath test results. Mr. Petrin's position is that it does not matter how the alcohol winds up in the mouth, whether it be by regurgitating, vomiting, acid reflux or another condition. His point is, if there is alcohol present in the mouth when the breath sample is taken, the result of the breath test will be inaccurate.

[41] This is not a matter of the trial judge having misapprehended the evidence. It is clear that she was aware of what the defence theory was and she directed herself to

the relevant issues. She made no mistakes about the substance or material parts of the evidence. The issue, rather, was that there was insufficient evidence to raise a reasonable doubt in the trial judge's mind.

[42] The problem with Mr. Petrin's argument is that what was advanced at trial is that it was *acid reflux* - not another condition - that led to the presence of alcohol in Mr. Petrin's mouth, thereby resulting in an inaccurate breath sample. However, the trial judge found she was not able to rely on Dr. Malicky's evidence about acid reflux, nor could she rely on his evidence to conclude that acid reflux could lead to the presence of mouth alcohol. She also pointed to a number of questions which, in my view, arise logically from a defence of this nature, but on which there was either no evidence or insufficient evidence (*Petrin, supra*, at para. 43):

> In carefully reviewing the evidence on this trial, I do not know what effect acid reflux has on the analysis of breath samples. It is unfortunate that there was no evidence called on exactly what acid reflux is; whether or not there can be alcohol in the stomach (as opposed to the blood) four to five hours after ingesting it; whether or not coughing can bring alcohol into the mouth, as opposed to belching or burping; if alcohol is in fact still in the stomach after four to five hours, how much alcohol would be in the stomach; if acid reflux brings alcohol into the esophagus, how would that effect *mouth* alcohol; and possibly other questions relating to Mr. Petrin's condition that Dr. Malicky was not qualified to answer. Medical evidence may have been helpful on this trial.

[43] It was argued that Mr. Petrin himself testified that he was having symptoms of acid reflux: he was coughing, he could taste "puke". But, Mr. Petrin is not an expert. It is one thing for him to testify that he has been diagnosed with acid reflux, that he was suffering symptoms and that he had been drinking that day. It is quite another for him to testify as to the mechanics of acid reflux and specifically, how it would lead to the presence of alcohol in his mouth.

[44] Mr. Petrin's lawyer pointed out that when it was determined that Dr. Malicky was not qualified to give testimony on acid reflux, he contemplated an adjournment. Ultimately, however, he decided to proceed. Following is the exchange between Mr. Petrin's lawyer and the trial judge *(Trial Transcript, p. 174)*:

> The Court: Hold on before you get into your adjournment application, let's deal with one thing at a time here.

> Now, Mr. Beaver, I understand - - the reason I'm not saying you can't ask questions about acid reflux is I don't know how Dr. Malicky knows of the physical effects or the physical process of acid reflux. He may know that. So it's just that at this point as a pharmacist I won't qualify him to give that. You can certainly ask how he knows it and then he may be able to definitively say that if a person has acid reflux there would be alcohol brought up. But I certainly, I would need to know how he would know that and if it's just from casual reading well then we may have a problem. I mean he says he's taken a course although he can't remember it on acid reflux but he must have. That's not, that's not an expert in that area.
>
> Mr. Beaver: So if I understand it correctly then, I'm allowed to ask him these questions, of course the Court may after hearing his answer determine that it is either not an admissible answer or whatever weight it puts on.
>
> The Court: Mm-hmm.
>
> Mr. Beaver: Thank you. I'm prepared to proceed.

[45] It was suggested in oral argument that counsel was led to believe that Dr. Malicky could, in fact, give testimony on acid reflux if the appropriate foundation was laid. From the foregoing exchange, however, it is difficult to see how Mr. Petrin's counsel could have been mistaken about the court's views. It is clear that admissibility and weight were, quite properly, left to be determined until Dr. Malicky actually testified.

c. Interpretation of 258(1)(d.01)

[46] Section 258(1)(d.01) of the *Criminal Code* provides that evidence of how much alcohol was consumed, the rate of absorption and elimination or a calculation based on that evidence of what the blood alcohol concentration would have been is not "evidence tending to show" malfunction or improper operation of the breath testing device.

[47] Mr. Petrin contends that the trial judge erred in her application of this provision. He points out that his argument is based on having advanced the theory that acid reflux led to the presence of mouth alcohol, as opposed to the "two beer" or "Carter" defence.

[48] As noted, the trial judge found she could not rely on Dr. Malicky's evidence and there was insufficient evidence that would otherwise raise a reasonable doubt about the accuracy of the breath samples. That left only Mr. Petrin's evidence of what he drank and the evidence about absorption and elimination of alcohol in Dr. Malicky's report, neither of which can be used as evidence tending to show that the breath testing device was malfunction or operated improperly. The conclusion that the trial judge reached was correct.

d. Comments about Average Absorption Rates

[49] The trial judge noted that the blood alcohol concentration rates in Dr. Malicky's report were based on average absorption and elimination rates. At paragraph 34 *(Petrin, supra)* she said:

> Being that there are people with a higher elimination rate than 20 milligrams percent, I would assume there are also people with a lower elimination rate than 10 milligrams percent.

[50] Mr. Petrin argues that the trial judge erred in making this comment because it was not founded in evidence and had a direct effect on the verdict.

[51] I see no merit to this argument. An average, by definition, is made up of higher and lower values. This is precisely the type of fact of which judicial notice may be taken.

Was the Sentence Improper?

[52] The trial judge imposed a fine and an eighteen month driving prohibition. Mr. Petrin argues that the length of the driving prohibition was excessive and that a prohibition of one year is more appropriate.

[53] The standard of review in sentencing is "one based on deference". *R. v. L.M.*, [2008] 2 S.C.R. 163, at para 15. Unless there is an error in principle, a failure to consider relevant factors or an overemphasis of relevant factors, the appeal court should only intervene if the sentence is demonstrably unfit. *R. v. M (C.A.)*, [1996] 1 S.C.R. 500, at para. 90.

[54] The transcript from the sentencing hearing reveals that the trial judge considered both the fact of and the age of Mr. Petrin's criminal record, including a prior conviction for impaired driving. She also considered his blood alcohol concentration and noted that it was relatively low, but nevertheless in excess of what is permitted by the *Criminal Code.* The trial judge was aware that Mr. Petrin reason for driving that night was that he was looking for his daughter, who had not returned from a snowmobile outing. In submissions on sentencing, Mr. Petrin's counsel provided submissions on Mr. Petrin's family circumstances, his occupation and employment situation and he advised that Mr. Petrin requires his vehicle for work.

[55] As noted by Charbonneau, J., in *R. v. William,* 2012 NWTSC 53, at para. 58, "Sentencing is a highly individualized, fact-driven, discretionary process." In this case, the trial judge determined that an eighteen month prohibition was appropriate. There is nothing to suggest that the trial judge overemphasized any particular factor or that she failed to consider relevant ones. It cannot be said that the length of the driving prohibition is demonstrably unfit.

[56] The appeal is dismissed.

K. Shaner
J.S.C.

Dated at Yellowknife, NT, this
19th day of July 2012

Counsel for Applicant: Shawn Beaver
Counsel for Respondent: Blair MacPherson

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