

Case Name:
R. v. Sipe

Between
Her Majesty the Queen, and
Tara Jane Sipe, Accused

[2014] A.J. No. 310

Action No. 130799091P1

Alberta Provincial Court
Edmonton, Alberta

J.L. Dixon Prov. Ct. J.

March 7, 2014.

(38 paras.)

Counsel:

M.E. Fernandes, for the Crown.

Y.R. Ziv, for the Accused.

Reasons for Judgment

1 J.L. DIXON PROV. CT. J.:-- Ms. Sipe was charged with refusing to provide a breath sample into an approved screening device. This alleged offence occurred the evening of June 21st, 2013, at a checkstop in Edmonton, Alberta.

2 The parties agree that the elements of this offence are accurately detailed in the Saskatchewan Court of Appeal decision in *R. v. Lewko*, [2002] S.J. No. 622, that the Crown bears the onus of proving beyond a reasonable doubt the following elements. First, a lawful demand was made of the accused; secondly, the accused failed to provide a sample of breath suitable for analysis; and thirdly, the accused intended to produce that failure, the mens rea of the offence.

3 While Mr. Ziv concedes the demand made in this case was a lawful demand, he argues that Crown has failed to discharge its onus, raising three arguments. Firstly, the Crown did not discharge its onus to establish the device was in good working order; therefore, has not proven the sample provided by the accused was inadequate. Secondly, the Crown has not established beyond a reasonable doubt the accused intended to fail to provide an adequate breath sample in the nine samples she offered. And, thirdly, even if the evidence supports the inference that the accused intended to refuse to provide an adequate breath sample in the nine tries, she was not permitted a further opportunity when she requested it of another officer while awaiting completion of her documentation, being the last-chance doctrine.

4 The Court heard from the investigating officer, the accused, and a friend who was in the car with her prior to her being stopped at the checkstop. The context of this allegation is not contentious. The officer was involved in a checkstop operation checking vehicles travelling westbound on the James MacDonald Bridge. The accused was a designated driver for an evening out at the Creperie restaurant in downtown Edmonton. She had agreed to drive her friend Tanyia and her friend's niece from Tanyia's home in Cloverdale to the restaurant. Cloverdale is a community at the east end of the James MacDonald Bridge. The Creperie restaurant is reached by driving west on the James MacDonald Bridge to downtown.

5 The accused picked up her friends and arrived at the Creperie for supper between 6 and 7. One bottle of wine was purchased and shared between Tanyia and her boyfriend. The accused had a glass of wine. Sometime after 10 PM the meal finished, and the accused drove her friends home to Cloverdale, crossing the eastbound portion of the James MacDonald Bridge. Both she and her friends saw the checkstop on the westbound bridge.

6 The accused, upon arriving at her friend's home, used the bathroom and then drove home.

7 At around 10:35 the accused was flagged over in the checkstop and approached by the investigating officer. Ultimately, the accused was charged with refusing to provide a breath sample. The accused was stopped at 10:35, and the formal demand for a sample of her breath was made at 10:38. She was charged for refusal at 10:45, seven minutes after the demand was made.

8 As with any case of refusal, the Crown is relying on circumstantial evidence to permit the Court to draw the inference that the accused intended to produce a failed breath sample. In this case, given the accused has given direct evidence, the Court is required to apply a *W.(D.)*, [1991] 1 S.C.R. 742, analysis to the evidence. If I accept the evidence of Ms. Sipe, I must acquit. Even if I do not accept all of the evidence of Ms. Sipe, if it raises a reasonable doubt in my mind whether she intended to provide an adequate sample of breath for analysis, I must acquit. Finally, even if I reject the evidence of the accused, I must still consider whether the Crown has discharged its onus to prove all the elements of the offence beyond a reasonable doubt.

9 In assessing the evidence of the accused, I have considered the guidance of the British Columbia Court of Appeal in *Faryna v. Chorny*, [1951] B.C.J. No. 152, which states as follows:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his [or her] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

10 The context of this matter before the Court informs the Court on the place and conditions. The accused has given very specific evidence, recalling significant detail of the evening. She was a designated driver. She picked up a party to the evening who was intending to drink. The accused limited herself to one glass of wine.

11 Driving her friend home, the accused saw the checkstop. There were other routes from Cloverdale to the accused's home that did not require crossing the James MacDonald Bridge.

12 The accused was not initially nervous upon encountering the investigating officer. The accused had been through checkstops before but had never been stopped.

13 I note in particular the accused's description of her interaction with the investigating officer and listened again on the digital recording of her evidence to ensure its accuracy. The accused indicated that the constable approached her window and asked for her driver's licence and registration. Her evidence was the following: (as read)

He looked at that and hesitated a little bit, and within five minutes asked if there was any drinking that evening, and I said there was not. He asked me to step out of the vehicle because he smelled alcohol and directed me to his cruiser.

14 The accused then gave evidence that after she was placed in the back of the cruiser: (as read)

The investigating officer said we were going to perform a roadside test and asked me if I had done that before, and I said, no, I haven't. He proceeded to set it up, and he asked me to firmly put my lips on the device and blow deep for 20 to 30 seconds.

15 I find that description significant because it is -- considering the test in *Faryna v. Chorny*, I accept that that's accurate, that the accused has accurately recalled the directions she was given. The language and descriptions the accused has used in that part

of her evidence are not generalized in any way; they are very specific, and they relate to the kinds of descriptions the Court regularly hears with respect to putting lips on the device and blowing deep.

16 That is not to preclude the possibility other instructions were given, but I am satisfied that the accused has related reliably the information that she was given at that time by the officer.

17 The accused indicates her first sample was unsuccessful, and she tried again. On the second failure the accused stated that the officer began to get agitated and said she was not doing it correctly. The accused denies she was ever told to blow in relation to a tone and that she was never told to blow until the officer told her to stop.

18 After the third or fourth time the accused stated the officer asked her to get out of the vehicle and handcuffed her hands behind her back, telling her she was being charged with refusal. The accused began to cry. She felt the officer was angry, so after the fourth test she asked him if he could get another officer to do the test. The officer refused.

19 After the accused was charged with refusal and was waiting for the officer to complete the paperwork, she gave evidence that she asked if she could have a Kleenex and asked the officer to remove her handcuffs. The officer refused but readjusted the handcuffs from behind the accused's back to in front of her.

20 The accused was driven home by the officer -- this is contextual evidence -- leaving the scene at 11:15 PM, and the accused has given evidence sometime in the half-hour between her arrest and leaving the scene that another officer walked by, and the accused stated she did not refuse to provide a breath sample and was told to be quiet.

21 The accused gave further evidence regarding the handcuffs, that she recalls them being removed on her front lawn when she arrived home for the evening, having been delivered by the constable.

22 The accused gave unequivocal evidence that she did not want to produce a fail on the instrument and that she was trying to cooperate with the officer.

23 In assessing credibility I must consider the evidence of the accused in the context of the evening. In this case the accused was driving friends as a designated driver. While she had a glass of wine, I accept she was mindful of her consumption and limited it to one glass. All of the evidence supports that she went out of her way to pick up her friends and that her friend Tanya benefited from the ride and shared the remainder of the bottle of wine with her boyfriend. I accept the accused saw the checkstop and made no effort to avoid it. This is consistent with her efforts that night to be a safe driver.

24 Having considered all of the evidence and the context of the evidence, I accept the evidence of the accused that she was not initially nervous or upset and made a true effort in the first few attempts to provide an adequate breath sample. I accept the evidence of the accused that she became anxious and upset as she continued to fail the test. I recognize

all of this occurred in a very brief period of seven minutes. The accused was being asked repeatedly to provide samples and was compliant promptly, albeit unsuccessfully, over that seven-minute period of time.

25 The Crown has suggested some adverse inference should be drawn by the Court from the failure of the accused to explain why she did not seal on the mouthpiece in the last four attempts. I am satisfied the accused has explained that in every attempt she made, she was trying to be successful. Given her direct evidence on this point, it was up to the Crown to attempt to impeach her evidence by pursuing that line of questioning in cross-examination. I am not prepared to draw an adverse inference on a point the Crown chose not to pursue in cross-examination.

26 The evidence from the accused regarding the sequence of her handcuffing raises some concerns. It is not probable in all the circumstances she was handcuffed after the third or fourth sample and then provided more opportunities to provide a breath sample without making a request. At the same time, her description regarding the Kleenex issue and having the handcuffs removed at her property when she was brought home satisfy me she does have some recollection about the handcuffing experience.

27 However, my concerns regarding the evidence of the handcuffing during the testing do not, in my assessment, undermine the reliability of the evidence given by the accused regarding her efforts to provide a breath sample.

28 In all, considering the *W.(D.)* analysis, the evidence of the accused causes this Court to have a reasonable doubt that she intended to fail to provide the breath sample, and having come to this conclusion, I find that the Crown has not discharged its onus to prove beyond a reasonable doubt that the accused intended to fail to provide a breath sample.

29 Having come to this conclusion regarding the evidence of the accused, it is unnecessary for me to consider the other two arguments raised by Mr. Ziv, and I am going to decline to do so.

Judgment (Not Guilty)

30 THE COURT: So, Ms. Sipe, I find you not guilty of the charge.

31 MR. FERNANDES: Thank you, Your Honour.

32 THE ACCUSED: Thank you.

33 THE COURT: All right? I thank everyone for the care they have taken in preparing and presenting this matter.

34 MR. ZIV: Thank you.

35 MR. FERNANDES: Have a good weekend.

36 MR. ZIV: Thank you.

37 THE ACCUSED: Thank you.

38 THE COURT: Good afternoon. Thank you.