Case Name:

R. v. Zack

Between
Her Majesty the Queen, and
Louise Zack

[1999] O.J. No. 5747

Ontario Court of Justice
Brampton, Ontario
Duncan J.

Oral judgment: May 26, 1999.
(12 paras.)

Counsel:

C. Letman, for the Crown.
J. Rosenthal, for the accused.

¶ 1 **DUNCAN J.** (orally):— In this case there is a Charter argument raised to the effect that the arresting Officer Jackson, did not have reasonable and probable grounds, or at least it being a warrantless search, the Crown has the burden of proof on the balance of probabilities that he did have and they failed in that.

¶ 2 There is a credibility issue here.

¶ 3 Officer Jackson said he received information from police dispatch that a tow truck driver was following a possible impaired driver. He came upon the accused in the driver's seat of a car at the place where she was expected to be and when he approached he spoke to her. There was a strong smell of alcohol on her breath. Her eyes were bloodshot but not badly. He asked for her driver's license and she produced it without difficulty, although he commented that she seemed confused and was slow in responding to that request. When she was asked to step from the vehicle he noticed she was a little unsteady on her feet and grabbed hold of the driver's door to steady herself. At that point he formed the opinion that she was impaired and the usual procedures were followed thereafter, including the breath demand.

¶ 4 It is noteworthy that the very experienced officer did not have in his notes the observation of her unsteadiness on her feet, nor that she was confused.

¶ 5 The information he had was apparently given to Officer Bailey. Officer Bailey said he received the information from Officer Jackson. Similarly, Bailey's notes failed to indicate anything about the unsteadiness on her feet, although according to Bailey there was mention that the accused had been weaving in her vehicle but as I said, that was not information that Jackson said that he had at a point in time before the arrest and reading of the demand.

¶ 6 It is common ground that it is Jackson's grounds that must be assessed and they must be assessed subjectively and objectively. With respect to the question of credibility, it is my view that I cannot accept on a balance of probability that the accused actually did present herself as unsteady on her feet and confused to Jackson. The failure to note these observations is a serious omission and, as I have noted to counsel, it cannot be accepted. If it was ever an acceptable explanation, in this day of full disclosure it cannot be an acceptable

explanation for a police officer to say 'I did not note it because I would remember it'. It is necessary for the officer to at least somewhere, maybe not necessarily in his notebook, put the significant observations that he made. In my view, the absence of the questioned observations in his notebook lead to the conclusion that those observations were not, in fact, made at the time but are perhaps something that over the course of time the officer has come to believe that he saw. I cannot accept, on the balance of probabilities, that those observations were made.

¶ 7 We then come down to the fact that Jackson had information, that I already noted, about the tow truck following the vehicle and its possible impaired driver. The Crown has asked me to infer that the tow truck driver must have, therefore, seen bad driving, weaving and the like. As I put to Crown counsel in argument that is not necessarily so because we do not know what information, if any, was conveyed to Jackson by the tow truck driver and the mere conclusory statement that it was a possible impaired driver is not sufficient because a hypothetical tow truck driver might very well come to that conclusion solely on the basis of one movement of the car or, as I mentioned, the fact that the car had pulled out of the parking lot of a place where liquor was served, for example. So, that conclusory statement that was passed on to Jackson is of little assistance.

¶ 8 With respect to the strong smell of alcohol, in my view, this is indicative of drinking but we do not know to what extent. The case referred to of Cooner is instructive on that point and it is worthwhile pointing out that the reasonable and probable grounds must be not only with respect to drinking but to an impaired ability to drive. The inference from the smell of alcohol alone or in combination with other factors does not go so far as to support the conclusion of impaired ability to drive. It only goes to what might be called the first step, that is to show that alcohol was consumed. This is so even if it is a strong smell of alcohol.

¶ 9 With respect to eyes being blood shot or red, as the case may be, that indicates some eye irritation but I do not know why that should necessarily be associated with alcohol consumption. Again, even if it is, all it shows is that the accused had consumed some alcohol.

¶ 10 In assessing the reasonable and probable grounds the officer must take into account all factors pointing both to guilt and away from guilt. In this case there seem to be some factors that do not seem to have been given any weight that should have been given weight. Her speech was good. She was had no difficulty with her coordination in getting her driver's license out of her purse.

¶ 11 Putting all of these positive and negative features together, notwithstanding the officer's subjective opinion as to her impaired ability, I must conclude that objectively there did not exist reasonable and probable grounds for the arrest and breathalyser demand.

¶ 12 Accordingly, the breath test results were the product of an unreasonable search and seizure. The question then is whether they should be excluded pursuant to s. 24(2) of the Charter. I raised with counsel the question of whether Stillman, [1997] 1 S.C.R. 607, had altered the traditional analysis with respect to this question when it comes to breath testing. I wrote a judgment some time ago in the context of denial of the right to counsel of choice where I concluded that it had. However, even if that is so, all that means is that the admission of the breath test results would not necessarily affect the fairness of the trial and, therefore, I must go on to consider the other factors under 24(2), including the seriousness of the breach. In my view, it is a serious breach because the existence of reasonable and probable grounds is the springboard by which this particular criminal process which is a serious one, can be initiated. It involves arrest, detention, and self-incrimination of the individual. The grounds upon which that unusual procedure --- I say unusual in that is it not common in a free and democratic society, but for the context of the breath testing of suspected impaired drivers. Because it is exceptional it is a serious hurdle that must be overcome. It is my opinion that where an accused is subject to arrest, detention, handcuffing and compulsory incrimination by giving breath samples that the absence of the grounds to provide the only statutory justification for that amounts to a serious breach. By following the lead of the Supreme Court of Canada in dealing with breathalyser samples and its view of the effect of admission on the repute to the administration of justice, I must conclude that the breath sample results must be excluded on the basis of the Charter argument.

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