

Citation: Date: 20070410
File No: 74880
Registry: Port Coquitlam

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

ADAM BRADLEY ROSENTHAL

**EXCERPT FROM PROCEEDINGS
RULING ON *VOIR DIRE*
OF THE
HONOURABLE JUDGE STONE**

Counsel for the Crown:	R. Gunnell
Counsel for the Accused:	M. Mines
Court Recorder:	L. Davies
Transcriber:	S. Wilson
Place of Hearing:	Port Coquitlam, B.C.
Date of Hearing:	April 10, 2007
Date of Judgment	April 10, 2007:

[1] **THE COURT:** We are on a *voir dire* and the defence position is that his client's rights were violated under the **Charter** because the officer, when he gave the demand for breath samples, did not have the reasonable and probable grounds to do so, and ultimately the detention of the accused was unlawful. Secondary to that is that the samples of breath taken were conscripted evidence because of the unlawful detention in the circumstances.

[2] Defence counsel submits that under s. 24(2) of the **Charter** the sample should be excluded.

[3] The Crown has said that they take no issue with the exclusion if I make a finding that the grounds, that is, the reasonable and probable grounds, did not exist for the demand to be made.

[4] The facts are very straightforward. The *voir dire* we entered into is dealing very specifically with the issue of reasonable and probable grounds.

[5] The officer in this case, who has some approximately two years experience on the force which does not mean that he was not experienced enough to properly deal with this, but it just is a fact, had stopped the accused at about 4:00 a.m. in the morning, it was 3:58, but basically when he started pulling him over he said it was about 4:00 o'clock.

[6] The accused, Mr. Rosenthal, was at Reeve Road and Pitt River Road in Port Coquitlam. That is apparently a T-intersection; there is a high school there and there are stoplights. The accused was heading south originally on Reeve

and apparently had driven his car over the white line where you would normally stop while waiting for the light to change.

There was virtually no traffic.

[7] While at the stop, the officer noted that there seemed to be some uncertainty. He felt that the fact of the vehicle being driven by Mr. Rosenthal was over the line was somewhat unusual and then there seemed to be hesitation by Mr. Rosenthal and instead of turning left, he went right and started heading back towards the Lougheed Highway, heading, I think he said, in a westerly direction.

[8] The officer immediately activated his emergency equipment and pulled him over. There was no untoward driving at all and when he pulled Mr. Rosenthal over, Mr. Rosenthal apparently did everything properly - produced his licence in the normal fashion; there was nothing untoward about his manner; he was cooperative; he was not erratic. There was nothing in his behaviour at all that was alarming in any way.

[9] The officer said in cross-examination that the accused slurred his speech in a mild fashion, although he was asked if he had any personal knowledge of Mr. Rosenthal's manner of speech, either before or after, and he said that he did not, but even at that he still said he had mildly-slurred speech.

[10] The officer said he an odour of liquor coming from his breath that was moderate to strong and when he smelled that, he asked if the accused had been drinking and the accused said he had had two drinks and then later on said more than a couple.

[11] Right at that point, the officer said that based on his training - he was a breathalyser technician on the Datamaster C or whatever they call them nowadays - he felt that with that type of *indicia* that he could make a conclusion as to a person being over the legal limit. He read the accused the demand and subsequent to that took him down to the detachment and then eventually had Mr. Rosenthal provide breath samples and released him some one-and-a-half hours after having initially stopped him.

[12] The cases provided to me are fairly straightforward. It seems to me that when one pursues historically the scheme of the section, traditionally the police officers were required to and did various roadside testing to allow them to come to the conclusion that the person was in such a state that they had reasonable and probable grounds to believe they had consumed alcohol.

[13] The historical definition of that in the case law was that reasonable and probable grounds had to satisfy a subjective and objective test, i.e. the officer must have subjectively believed honestly that the person had the symptomology to the extent that they should be requested to provide breath samples. But on top of that there must be an objective basis for them coming to that subjective conclusion, i.e. observations that the court can assess in seeing whether objectively that it existed as well.

[14] Hence the law developed and we had the various typical types of *indicia* given in court: watery, bloodshot eyes; swaying

when walking; slurred speech; falling down, stumbling and there is a litany of various observations and various testing that went on.

[15] Then we started having the case law develop where there were questions put to whether the officer was improperly detaining a person; whether or not when they were performing these tests or requiring them that they properly should be doing so when they were in the investigative process; there were a lot of different things were happening in the law.

[16] Now we have the ASD provisions which allow the officer, if they have a suspicion that the person has alcohol in their system, that they can require an ASD and if they fail on that, then that gives them the grounds for the breathalyser test.

[17] I think historically that has come about because of the various difficulties and interpretations that have been given to the officers when they were seeking to establish reasonable and probable grounds, and it gave them in effect a shortcut and an easy method by which to provide the grounds if they had a suspicion.

[18] The cases that I have been given, ***R. v. Freeman*** which is a decision of Judge Hoy on March 30th, 2004; ***R. v. Kennedy***, Ontario Court of Justice, Selkirk J. that appears to be decided May 17th, 2005; the case of ***R. v. Jarvis***, decided by Judge Blake on August 23rd, 2005. I was also given ***R. v. Soczynski***, 2006 BCPC 0091 which is a decision of Judge Baird Ellan dated March 14th, 2006. They all go through cases where the symptomology was in my view

greater than what we have here and they all concluded that that was not sufficient for reasonable and probable grounds.

[19] It was pointed out to me that in the case of Judge Baird Ellan's decision in *R. v. Soczynski*, *supra* she concluded that with the symptomology which she found which was a slight odour of alcohol; an initial denial of consumption with the subsequent admission of one beer; speech apparently slurred in a brief conversation during which the accused had a penny in his mouth; swaying while standing on an even surface with a sling on his arm; that that was not sufficient for reasonable and probable grounds. However, she goes on by way of *obiter* to say:

[28] I note that Constable Kokkaris had with him and could easily have used, with full authority and justification, an approved screening device, but declined to do so. While there is no obligation on him to perform the screening test, in this case there was no apparent reason not to, and without it, in my view, the investigation on the whole did not meet the standard described in *Gavin*, and the grounds were not sufficient.

[20] Of course I echo that in this case. The officer said very frankly that within minutes basically he could have had assistance with an ASD. He himself was not qualified but he said it would not have been a problem. He just felt he did not need it. So it is not a floodgates argument and it does not create a great difficulty for the officer in this particular circumstance to have requested the ASD, had it performed, and then if there was a fail, he would have had the proper grounds to have the breathalyser demand.

[21] I agree with the defence submission that in these particular circumstances, with this evidence, in my view the reasonable and probable grounds are not established.

[22] As a result of the position of the Crown, we do not have to go into a s. 24(2) analysis that if the Crown sought on the trial as a whole while we are out of the *voir dire* to have the certificate tendered based on my ruling, I would not have admitted it into evidence and that is not being contested.

[23] So where do we go from here? We have not had a formal requirement and there has not been anything tendered on the *voir dire*, you see -

[24] **MR. GUNNELL:** Well, I would suggest that subject to Your Honour's ruling, the certificates would not be admissible and that the evidence that we heard on the *voir dire* become part and parcel of the trial and the Crown is calling no further evidence.

[25] **THE COURT:** And by - by agreement -- that we agree that the evidence on the *voir dire* becomes the evidence at the trial so we have got repetition? I will make that ruling and then the Crown's calling no further evidence?

[26] **MR. GUNNELL:** That is correct.

[27] **THE COURT:** All right, then you are inviting me to dismiss and I dismiss both counts. Thank you.

(RULING ON *VOIR DIRE* CONCLUDED)