Citation: R v Rule, 2017 MBCA 86 Date: 20170911
Docket: AR17-30-08866

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

HER MAJESTY THE QUEEN	)	***M. Wasyliw***
	)	*for the Applicant*
(Respondent) Respondent	)	
	)	***M. A. Bodner***
- and -	)	*for the Respondent*
	)	
JOSEPH CHARLES RULE	)	*Chambers motion heard:*
	)	***August 31, 2017***
(Accused) (Appellant) Applicant	)	
	)	*Decision pronounced:*
	)	***September 11, 2017***

CHARTIER CJM

[1] The accused applies for a second-level appeal pursuant to section 839 of the *Criminal Code*. He was convicted on a charge of driving with a blood-alcohol level of over .08 by a judge of the Provincial Court (the trial judge). He appealed the conviction to a judge of the Court of Queen's Bench, sitting as a summary conviction appeal judge (the SCAJ). The SCAJ upheld the conviction and dismissed the appeal.

[2] The accused now seeks to appeal a second time. As I stated in *R v Forsythe (JR)*, 2009 MBCA 62 (at para 3):

> [A]n application for leave under s. 839 should be granted sparingly and with good reason. This case has already been reviewed by a judge of the Court of Queen's Bench, which is the primary appellate

> court to review such matters (see *R. v. Suberu*, 2007 ONCA 60, 85 O.R. (3d) 127, and *R. v. Langlois (D.J.)*, 2008 MBCA 72, 228 Man.R. (2d) 256). Here, the granting of leave would bring about a second-level appeal. As was recently stated by Freedman J.A. in *R. v. Denys (C.D.)*, 2009 MBCA 39, when considering a s. 839 chambers leave application, "[t]he policy of the law is clearly to discourage second-level appeals in the absence of some compelling reason to conclude otherwise" (at para. 32).

[3] The criteria to be met before leave to appeal can be granted are well settled and are as follows:

1. The ground(s) raised must involve a question of law alone.

2. Even if a question of law does arise, leave should only be granted if the matter raises an arguable case of substance.

3. There must be something exceptional about the arguable case warranting a second appeal hearing (see *R v M (RW)*, 2011 MBCA 74 at paras 26, 32 and 34).

[4] The facts are straightforward. The police officer observed a car weaving slightly within its lane. This caused him to suspect that the driver may be impaired. As a result, he pulled the car over. Two people were in the car. The accused was the driver. The officer noticed that the accused exhibited signs of impairment, including glassy and watery eyes, flushed cheeks, and slurred speech. He also noticed that the accused fumbled somewhat with his licence when asked to produce it, the passenger appeared to be impaired as well, and an odour of liquor was emanating from the vehicle. In order to determine whether the passenger was the sole source of the odour, the officer requested to smell the accused's breath by asking him to blow in his face. After the accused blew, the

officer was able to determine that there was an odour of liquor emanating from his breath. This last factor buttressed the officer's opinion that the accused was impaired. He arrested him for impaired driving and made the breathalyzer demand. The accused's breathalyzer readings were 150 milligrams of alcohol per 100 milliliters of blood.

[5] At trial, the accused argued that the officer's request to smell his breath was a violation of his section 8 *Charter* rights. The trial judge found no breach. On appeal, the SCAJ upheld the trial judge's section 8 *Charter* ruling and conviction.

[6] The accused raised, in his notice of motion for leave to appeal, the following two grounds:

1. That the SCAJ erred in law by finding that the police are allowed to conduct warrantless searches for evidence upon detention.

2. That the SCAJ erred in law by finding that an officer may demand a detainee "blow into his face" is a search that is prescribed by law.

[7] At the hearing he reframed his grounds to the following two questions:

1. Did the SCAJ err in law by concluding that the officer's request to smell his breath fell under the ambit of section 76.1 of *The Highway Traffic Act*, CCSM c H60 (the *HTA*), and was thereby authorized by law? and

2. If the officer's request was authorized by law, did the SCAJ err in law by failing to conclude that it constituted an unreasonable search?

[8] For the reasons that follow, I deny leave to appeal all questions. Assuming, without deciding, that the questions raised are questions of law, I have not been persuaded that they raise an arguable case of substance.

[9] The SCAJ noted that in *R v Weintz*, 2008 BCCA 233, the British Columbia Court of Appeal dealt with the same issue (the legality of a request to blow breath into the officer's face). In *Weintz*, the Court relied on *R v Orbanski; R v Elias*, 2005 SCC 37 (*Orbanski*), a case originating in Manitoba, where the Supreme Court of Canada interpreted the general police powers to stop vehicles pursuant to section 76.1 of the *HTA*. The Supreme Court of Canada held that, implicit in those powers, was the authority for the police to: a) ask whether the driver had been drinking; and b) require the driver to perform sobriety tests. In *Weintz*, the appeal court did not "perceive any distinction between those sorts of investigative procedures and asking a person to blow breath into the face of the investigating officer" (at para 22). It held that this screening measure (to ask a driver to blow breath into the officer's face) did not violate sections 7 or 8 of the *Charter*. An application for leave to appeal *Weintz* was dismissed by the Supreme Court of Canada (see 2008 CarswellBC 2424). Relying on *Orbanski* and *Weintz*, the SCAJ dismissed the appeal.

[10] In light of *Orbanski* and *Weintz*, I have not been persuaded that the accused has raised an arguable case of substance. As stated in *Orbanski*, the authority of officers to check the sobriety of drivers arises in relation to the powers that are necessarily implicit in the general statutory vehicle stop provision found

in section 76.1 of the *HTA* and in their duty to enforce section 254 of the *Criminal Code* (see paras 43-44). *Weintz* concluded that requesting drivers to blow their breath into an officer's face falls under such general powers.

[11] The accused's argument, that the request to smell his breath is fundamentally different than conducting sobriety tests or asking the accused if he had been drinking, is a distinction without a difference. Moreover, the officer's screening measure was minimally intrusive and speedily performed at the roadside and was therefore reasonable. In the result, I remain unconvinced that any of the questions raised by the accused are of any substance or of such significance to merit a second-level appeal.

[12] Leave to appeal is therefore denied.

Chartier CJM