On appeal from a summary conviction in the Provincial Court on October 30, 2019.

Date: 20201117
Docket: CR 19-01-37622
(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	
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	)	for the respondent
- and -	)	
	)	MARK WASYLIW
RUSSELL CHARLES FARLEY,	)	for the appellant
	)	
(accused) appellant.	)	
	)	JUDGMENT DELIVERED:
	)	NOVEMBER 17, 2020

TURNER J.

INTRODUCTION

[1] After a trial in Provincial Court, on October 30, 2019, Russell Charles Farley was convicted of one count of operating a motor vehicle having consumed alcohol in such a quantity that the concentration in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood. It is from the conviction that he now appeals.

[2] At the trial, Mr. Farley argued that his section 8 and section 10(b) rights under the ***Canadian Charter of Rights and Freedoms*** were infringed. The trial judge dismissed those arguments. Mr. Farley now appeals the trial judge's findings that his rights were not infringed.

THE FACTS

[3] On December 8, 2018, Cst. Arjun Sriran and Cst. Karen Houde, of the Winnipeg Police Service, were conducting a road watch for impaired drivers. The officers' unmarked cruiser car was parked outside of the parking lot of Lipstixx Exotic Night Club & Sports Bar (the bar), at the corner of Alexander Avenue and Arlington Street, in Winnipeg.

[4] At 9:20 p.m., the officers saw Mr. Farley leave the bar and drive away in his truck. They followed him for a short distance. Mr. Farley made a turn without signalling, and the officers decided to conduct a traffic stop. The officers activated the cruiser car's emergency lights and siren. They then activated the siren a second time. Mr. Farley continued to drive for a block before he stopped his vehicle, at 9:25 p.m.

[5] Constable Sriran approached Mr. Farley's vehicle and asked Mr. Farley where he was coming from. Mr. Farley replied that he was coming from out of town and wanted to stop at Tim Hortons for a coffee. Constable Sriran asked Mr. Farley if he had had anything to drink. Mr. Farley replied, "No, I did not have anything to drink at all."

[6] Constable Sriran then asked Mr. Farley a similar question of whether he had stopped anywhere and whether he had had anything to drink. Again Mr. Farley said that he had not stopped anywhere, and he said that he did not have any alcohol in his system.

[7] Constable Sriran noted that Mr. Farley's speech was fairly slow and deliberate while speaking to him. He also noted a faint smell of alcohol on Mr. Farley's breath.

[8] Constable Sriran told Mr. Farley that he had seen him leave the bar and that he thought Mr. Farley was lying. At that point, Mr. Farley said that he was sorry, that he had stopped at the bar briefly. Constable Sriran immediately made a demand that Mr. Farley provide a breath sample into an Approved Screening Device (ASD). He considered the following in making the ASD demand:

- Constable Sriran saw Mr. Farley leave the bar swiftly, get in his truck, and depart the parking lot right away.
- While he was driving, Mr. Farley made a turn without signalling.
- Mr. Farley failed to stop his vehicle for approximately one block after the officers had activated the cruiser car's emergency lights and siren. In fact, the siren had been activated twice.
- Constable Sriran smelled a faint odour of alcohol on Mr. Farley's breath.
- Mr. Farley spoke in a fairly slow and deliberate manner.

[9] When Cst. Sriran made the ASD demand and asked Mr. Farley if he understood, Mr. Farley said, "Yes, I do understand, but I was not doing anything wrong." He also said, "I'm just going to grab a coffee and go home."

[10] Constable Sriran made the ASD demand at 9:30 p.m. Mr. Farley "blew a fail" at 9:38 p.m. Constable Houde advised Mr. Farley of his arrest for impaired driving. Mr. Farley replied, "Yeah, sorry, I stopped for one." Constable Houde read the breath demand from the back of her notebook to Mr. Farley. Mr. Farley agreed that he would provide breath samples.

[11] Constable Houde then advised Mr. Farley:

> You have the right to retain and instruct counsel in private without delay. This means that before we proceed with our investigation you may call any lawyer you wish or get free legal advice from duty counsel immediately. If you want to call duty counsel we will provide you with a telephone and telephone numbers. If you wish to contact any other lawyer a telephone and telephone book will be provided. If you are charged with an offence you may also apply to Legal Aid for assistance. Do you understand?

[12] Mr. Farley replied, "Yes." Constable Houde then asked him, "Do you want to call a lawyer?" Mr. Farley answered, "No."

[13] While the officers waited for the arrival of the check stop van, Cst. Sriran started filling out the impaired driving check sheet questionnaire. In doing so, Cst. Sriran again advised Mr. Farley of the breath demand. Mr. Farley said he understood the breath demand.

[14] Constable Sriran repeated, in exactly the same words, the right to counsel that Cst. Houde previously read to Mr. Farley. Mr. Farley again said that he understood. When Cst. Sriran asked Mr. Farley if he wanted to call a lawyer, he replied, "No." Mr. Farley also said, "I didn't do anything wrong." At 9:46 p.m., Cst. Sriran then read the following to Mr. Farley:

> I am required to advise you that you are entitled to a reasonable opportunity to try to contact duty counsel or any other lawyer. While you are trying to contact a lawyer we cannot take a statement from you or ask you to participate in any process that might provide evidence against you. Do you understand?

[15] Mr. Farley said he understood. Constable Sriran asked Mr. Farley if he wanted to call a lawyer. Mr. Farley replied, "No." He then asked, "What will be the consequences?" There was no evidence that Cst. Sriran provided an answer to that question.

[16] Constable Sriran asked Mr. Farley several questions as part of the impaired driving check sheet questionnaire. During these questions, Mr. Farley admitted that he had had two bottles of Bud Light—one at 8:30 p.m. and the second at 9 p.m.

[17] At 10 p.m., the check stop van arrived. Mr. Farley provided two breath samples. The first was taken at 10:18 p.m., and the result of the analysis was one hundred milligrams of alcohol in one hundred millilitres of blood. The second was taken at 10:40 p.m., and the result of the analysis was ninety milligrams of alcohol in one hundred millilitres of blood.

[18] Constable Houde advised Mr. Farley of his arrest for driving with a blood alcohol concentration of over .08, and again advised him of his right to counsel. Mr. Farley again declined to contact counsel. He was released on an appearance notice.

Evidence of Mouth Alcohol Contamination

[19] At trial, Cst. Sriran testified that he had been trained regarding the potential of mouth alcohol contamination in the ASD process. He said that he was aware of police protocol to ask a subject whether they had consumed alcohol in the 15 minutes before the ASD test. This was to ensure that any mouth alcohol had time to dissipate so as not to contaminate the ASD test results.

Mr. Farley's Testimony

[20] Mr. Farley testified at trial. He testified that that night he was driving from Selkirk to Winnipeg and had one beer at the bar before leaving. According to Mr. Farley, a maximum of three to five minutes elapsed between his last sip of beer and when he was stopped by police.

[21] Mr. Farley testified that he did not understand why he was arrested and did not understand whether he needed to call a lawyer. He said that the officers were correct in their testimony regarding the information they provided to him. However, Mr. Farley believed that Cst. Sriran got frustrated with him, and so Mr. Farley "let it go". He asserted that he never told the officers that he did not want to speak to counsel.

[22] Mr. Farley agreed that after the ASD indicated a "fail", he was advised of his arrest for impaired driving and he was told that he had the right to contact a lawyer. He also agreed that he was told that he had the right to speak to a lawyer of his choice or to Legal Aid. He testified that he did not remember hearing the police caution or the waiver warning. He denied telling the officers that he did not want to speak to a lawyer.

The Trial Judge's Findings

[23] The trial judge found that the evidence of the officers was credible and largely reliable. He noted that Cst. Sriran was a "very careful" witness whose answers appeared "thoughtful".

[24] The trial judge found that it was difficult to accept any of Mr. Farley's evidence and described it as "unbelievable".

[25] The trial judge did not accept Mr. Farley's assertion that the reason he did not contact counsel was because the officers did not explain the consequences he faced. He also rejected Mr. Farley's position that he was unable to understand what the officers were saying to him. The trial judge noted that there was no evidence of a language barrier and no evidence that Mr. Farley suffered from an infirmity that would prevent his understanding.

[26] The trial judge noted that Cst. Sriran did not specifically ask the question about whether Mr. Farley had anything to drink in the previous 15 minutes; therefore, he did not precisely follow the training he had received with respect to administering the ASD test. However, the trial judge found that this was of no consequence in this case because Mr. Farley had twice denied having anything to drink. Mr. Farley only admitted to having one beer after having failed the ASD test.

[27] The trial judge accepted that there was no reason for Cst. Sriran to ask about alcohol consumption in the previous 15 minutes because none of the information presented to Cst. Sriran at the roadside would lead to the conclusion that Mr. Farley potentially had mouth alcohol contamination.

[28] The trial judge found that the officers did not breach Mr. Farley's section 8 or section 10(b) ***Charter*** rights.

ISSUES

[29] This appeal raises two issues:

1. Did the learned trial judge err in holding that Mr. Farley's right to counsel was not infringed?

2. Did the learned trial judge err in holding that Cst. Sriran was not required to inquire about recent alcohol consumption?

STANDARD OF REVIEW

[30] The jurisdiction for this appeal is set out in section 813(a)(i) of the ***Criminal Code***.

[31] The Manitoba Court of Appeal in ***R. v. Farrah (D.)***, 2011 MBCA 49 (CanLII) at para. 7, set out the standard by which a court is to review the issue of whether there was a ***Charter*** breach:

> a) When examining a judge's decision on whether a ***Charter*** breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
>
> b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see ***Grant*** at para. 129).
>
> c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see ***R. v. Shepherd***, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).
>
> d) The decision on whether to exclude under s. 24(2) of the ***Charter*** is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see ***Grant*** at para. 86, and ***R. v. Beaulieu***, 2010 SCC 7 at para. 5, [2010] 1 S.C.R. 248).

[32] The standard of review where it is claimed that a verdict is unreasonable was summarized by the Supreme Court of Canada in ***R. v. R.P.***, 2012 SCC 22, [2012] 1 S.C.R. 746, as follows:

> [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in ***R. v. Yebes***, [1987] 2 S.C.R. 168, and ***R. v. Biniaris***, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (***R. v. Sinclair***, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; ***R. v. Beaudry***, 2007 SCC 5, [2007] 1 S.C.R. 190).
>
> [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (***R. v. Burke***, [1996] 1 S.C.R. 474, at para. 7).

ANALYSIS

Did the learned trial judge err in holding that Mr. Farley's right to counsel was not infringed?

[33] Mr. Farley asserts that the police failed to implement his right to counsel. He says that given what was said at the roadside, the police had a duty to further explain his right to counsel and clear up any misunderstandings that he may have had.

[34] The onus is on Mr. Farley to establish a ***Charter*** breach on a balance of probabilities.

[35] The implementation duties flowing from the right to counsel "are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel": ***R. v. Owens***, 2015 ONCA 652 (CanLII) at para. 24.

[36] After providing the ASD breath sample, Mr. Farley told the officers twice that he understood his right to counsel and did not wish to speak to a lawyer—once to Cst. Houde at 9:40 p.m. and once to Cst. Sriran at 9:42 p.m. After his arrest for driving with a blood alcohol concentration of over .08, Mr. Farley again told Cst. Houde that he did not wish to speak to a lawyer.

[37] Mr. Farley says that when he asked Cst. Sriran about the potential consequences, Cst. Sriran had a duty to go further and clear up any misunderstanding that may have occurred. I cannot agree. The trial judge accepted Cst. Sriran's evidence that prior to asking a question regarding consequences, Mr. Farley clearly said "no" in answer to whether he wanted to call a lawyer.

[38] I agree with the trial judge that requiring a police officer to give a person information about the potential consequences of an event would put the officer in an impossible position. A police officer would surely be open to criticism for providing either too little or too much information about potential consequences. Answering questions regarding potential consequences would be delving into territory of providing legal advice, which would clearly be beyond the scope of information to be provided by a police officer. A police officer is required to advise of the reason for arrest or detention, a breath demand (if applicable), the right to counsel, and the right to remain silent. A police officer must

make sure that the person understands all of that information and the jeopardy he/she faces. A police officer is not, however, required to explain the potential consequences that a person may face.

[39] The trial judge did not believe Mr. Farley's testimony that he did not understand his right to counsel. That credibility finding is entitled to great deference and should not be disturbed unless the trial judge has made a palpable and overriding error. I do not find that he has made such an error.

[40] There was no language barrier or infirmity that would prevent Mr. Farley from understanding what the officers were telling him. To the contrary, every time the officers asked, "Do you understand?", Mr. Farley replied that he did.

[41] Mr. Farley has not demonstrated that the trial judge committed a palpable and overriding error. The trial judge correctly stated the legal principles and applied them to the facts he had found. This ground of appeal is dismissed.

Did the learned trial judge err in holding that Cst. Sriran was not required to inquire about recent alcohol consumption?

[42] A breath demand is a warrantless search; therefore, at trial, the onus was on the Crown to show that, on a balance of probabilities, the seizure was reasonable.

[43] The effects of mouth alcohol contamination on the reliability of the ASD test have been recognized in ***R. v. Bernshaw***, [1995] 1 S.C.R. 254 at para. 85, 1995 CanLII 150, as well as in ***R. v. Mastromartino***, 2004 CanLII 28770 at paras. 30–32 (ON SC). It is well established that "the presence of mouth alcohol can effect the reliability of ASD

tests." Taking an ASD sample within 15 minutes of alcohol consumption can produce a false "fail" reading on the test.

[44] The timeline of events in this case shows that Mr. Farley did not consume alcohol for at least 18 minutes prior to the ASD test. The officers saw him leave the bar at 9:20 p.m. The ASD demand was made at 9:30 p.m., and Mr. Farley "blew a fail" at 9:38 p.m. The concerns of mouth alcohol contamination that arise when alcohol is consumed very shortly before the ASD test is administered are simply not present in this case.

[45] Even if I am incorrect about the timeline, a long list of previous cases show that Cst. Sriran was not obliged to obtain a drinking history from Mr. Farley in these circumstances.

[46] In ***R. v. Einarson***, 2004 CarswellOnt 903 (WL Can), the Ontario Court of Appeal held that a routine delay in administering the ASD test is inconsistent with the principle that such a test is to be administered forthwith. The court held that there is no legal requirement that a police officer delay an ASD test when there is no evidence about the timing of the driver's last drink.

[47] In ***R. v. Szybunka***, 2005 ABCA 422 (CanLII), the Alberta Court of Appeal held that even when police see a driver leaving the parking lot of a bar, they are not, on that basis alone, required to ask about recent alcohol consumption.

[48] The Manitoba Court of Appeal in ***R. v. Mitchell***, 2013 MBCA 44 (CanLII), went so far as to say that "rarely will there be a need for a police officer to obtain an alcohol consumption history from a driver. That is not what the legislation requires or what was intended by it."

[49] Mr. Farley points to several cases where courts held that the police officer was required to ask about recent alcohol consumption or approved of the officer waiting 15 minutes before administering the ASD test. These cases are all distinguishable on their facts, particularly in regard to admissions of alcohol consumption:

- ***R. v. Bridgeman***, 2005 CanLII 46090 (ON SC) — Although Mr. Bridgeman told the police officer that he had not been drinking, his passenger told the officer that they had been drinking that day. The passenger told the police officer that Mr. Bridgeman had consumed two pints of beer at a gas station a short distance down the road just before being pulled over. There was also open beer within the vehicle. There were clear, objective factors that should have led the police officer to question whether Mr. Bridgeman had consumed alcohol in the previous 15 minutes; therefore, the ASD test should have been delayed.

- ***R. v. Seivewright***, 2010 BCSC 1631 (CanLII) — The police officer saw Mr. Seivewright leave the parking lot outside of a pub and fail to stop at a stop sign. Mr. Seivewright initially denied having had anything to drink but then admitted he had had two beers, the last being within 20 minutes. The court held that the police officer

was not entitled to rely on Mr. Seivewright's initial denial of alcohol consumption when it was shortly followed by an admission of recent consumption.

- ***R. v. Pierman***, 1994 CanLII 1139 (ON CA) — The police officer saw Mr. Pierman leave a tavern, Mr. Pierman admitted to having had two beers, and the officer said he could detect the smell of fresh alcohol on Mr. Pierman's breath. The police officer further testified that he felt that Mr. Pierman might have had a beer just before leaving the tavern. He, therefore, delayed administering the ASD test for 15 minutes. The court held that those factors were sufficient to justify the police officer's concern that he should delay the ASD test.

[50] In the case at bar, I agree with the trial judge that there was no credible evidence that would indicate that Mr. Farley had consumed alcohol within 15 minutes before the ASD test was administered. Even though Cst. Sriran had his doubts about the truth of the answers Mr. Farley provided at the roadside, Mr. Farley was adamant that he had not been drinking at all. It would be futile to require the officer to continue to ask questions for which he had already received a response.

[51] The trial judge properly focused on the information that Cst. Sriran knew when the ASD demand was made. The trial judge did not commit a palpable and overriding error. He properly applied the law to the facts that he found.

[52] This ground of appeal is also dismissed.

CONCLUSION

[53] The appeal is dismissed.

_____J.