CITATION: *R. v. Ffrench*, 2022 ONCJ 134
DATE: March 25, 2022

ONTARIO COURT OF JUSTICE

Central West Region
Brampton Ontario

B E T W E E N :

HER MAJESTY THE QUEEN

-and-

RYAN FFRENCH

REASONS FOR JUDGMENT

Duncan J.

1. The defendant is charged with drive while disqualified, contrary to section 320.18(1) *Criminal Code*.

2. That he was driving while disqualified is not in dispute. What is in dispute is whether the Crown has proven that the defendant had knowledge of the disqualification and whether his stopping while driving was lawful and/or tainted by racial profiling.

The evidence:

3. On September 17 2020 Peel Police officer Reid was working alone in uniform in an unmarked police car. His assigned duties included attending a plaza at Queen and Rutherford for enforcement of various laws including drinking driving offences. The plaza included two bars, one of which was Jack Rollers.

4. While at the plaza, the officer's activities included checking plates of cars in the parking lot for suspensions and checking the sobriety of drivers leaving the area. His notes also indicated an interest in covid rule violations and gang

activity, as the bar in question had some history. Just before his dealings with the defendant he followed a car leaving the plaza and stopped it for a sobriety check. The driver showed no indicia of impairment and was soon permitted to be on his way. Reid returned to the plaza. [1] This other sobriety check stop takes on significance on the allegation of racial profiling because that driver of that car was not black.

5. Reid testified that after returning to the plaza, shortly after 11 pm, he saw two men in the area in front of Jack Rollers bar. He made a note that included reference to their race "M.B x 2". The men then entered a car, a 2018 Honda Accord, and left the lot. The plate on the Honda was one of the ones Reid had previously run and the query disclosed the registered owner as a numbered company, indicating it was possibly a rental car.

6. The officer said he decided to stop the vehicle to check sobriety. He followed it out to the street and soon activated his emergency lights. The Honda made a quick turn into a Popeye's lot and nosed into a spot. The officer followed and saw the Honda shake and move. When he got to the car, the defendant was sitting in the back seat. Another man was in the passenger seat. No one was in the driver's seat. Reid directed the defendant to get back into the driver's seat. He complied and when asked, identified himself. The officer queried the name, and it revealed the defendant to be a disqualified driver and on probation.

7. On receiving that information and deciding to arrest, Reid requested assistance. He then went back to the car and arrested the defendant for driving while prohibited and failure to comply with probation. He did a pat down search and handcuffed him. The other officers then arrived, and the defendant was turned over to them to give rights to counsel.

8. Reid then returned to the car, requested the passenger to step out, and searched the car "incident to arrest" and under the *Liquor Licensing Act* [2] because there were empty beer cans in the driver's area and an empty beer box in the rear area of the car. *Nothing was found in the search*.

9. The defendant was released from the scene on an appearance notice. He left in the same car, driven by the former passenger who had satisfied the police that he was licenced and sober.

10. The defendant testified solely on the *Charter* issue. He said he was with three friends and they went to the plaza in two cars, intending to go to Jack Rollers. Three of them stayed standing near the cars while one of them went to the bar to check on the cover charge. He reported back that it was $20 and they concluded that was too steep. They hung around for about 15 minutes and then headed

home, the defendant driving the Honda. He said that he had noticed the "suspicious" unmarked police car while they were hanging out and he saw it follow him as he drove to the exit.

11. The defendant agreed that he was pulled over as described; that he jumped into the back seat and was directed to return to the driver's seat. He agreed that he was asked for his licence, that he didn't have one but gave his name, the officer checked it out and soon thereafter arrested him. [3]

12. There was one point of disagreement. The defendant said he asked why he had been stopped and the officer answered: "a lot of people go to that bar with guns". The officer was asked in cross examination whether he recalled saying such a thing and he said he did not. Oddly he was never asked what he *did* say, if anything, or whether he was even asked the question by the defendant.

13. The defendant also testified that as he sat in the rear of the police car he saw his car, including the trunk, being searched. The officer had not been asked any questions about the details or extent of the search.

Knowledge:

14. Counsel argues that the Crown must prove that the defendant knew at the time of driving that he was disqualified. He submits that the Crown has failed to do so.

15. Accepting that the Crown has that burden, in my view it has been satisfied in this case. Considering:

- The prohibition was imposed barely 2 months earlier.
- The prohibition was for four years.
- The defendant was present in court (virtually) when the prohibition order was made.
- The defendant was represented by counsel who was also present.
- A guilty plea was entered to the underlying offence giving rise to the prohibition order. The order and its effect as a consequence of that plea would have undoubtedly been discussed before plea and sentence. Counsel would have been available to the defendant if he had any question about the prohibition.

- The defendant jumping into the back seat shows consciousness of knowledge that he should not be driving.
- He did not possess a licence.
- The defendant did not testify that he did not know or was uncertain or mistaken about his disqualified status.

The Charter Application:

16. The defendant has brought a *Charter* application alleging violations of sections 8 and 9 and seeking exclusion of evidence as a remedy under section 24(2).

Section 9 – Arbitrary detention

17. The legal principles applicable to these issues can be stated in a nutshell: The stopping of a motorist will be lawful and not arbitrary if it is made on reasonable grounds or if it is made without grounds for a proper traffic purpose [4] that is not a ruse or pretext. [5] However even if the stop satisfies these requirements, it will be invalidated and a violation of section 9 if it is tainted by racial profiling to any degree: *R. v. Humphrey*, 2011 ONSC 3024 (CanLII), [2011] O.J. No 2412, paras. 79-109; *R. v. Brown*, 2003 CanLII 52142 (ONCA), [2003] OJ No 1251; *Peart v. PRP*, 2006 CanLII 37566 (ONCA), [2006] OJ No 4457; *R v. Dudhi*, 2019 ONCA 665 (CanLII), [2019] O.J No 4333; and *R. v. Sitladeen*, 2021 ONCA 303.

18. The circumstances that bear on whether the stop was legally authorized or a pretext are similar to and over-lap with the circumstances that bear on the racial profiling issue. For this reason, I will deal with them together under that heading.

***Racial profiling**:*

19. Succinctly stated, racial profiling occurs when race or racial stereotypes are used either **consciously** or **unconsciously** in the **selection** or the **treatment** of a suspect: *R. v. Le*, 2019 SCC 34 (CanLII), [2019] SCJ No 34, at para 76.

20. Racial profiling is wrong and cannot be tolerated. [6] It is offensive to fundamental concepts of equality and the human dignity of those who are subject to negative stereotyping. It fuels negative and destructive racial stereotyping of those who are subjected to profiling. Racial profiling will also ultimately undermine effective policing both by misdirecting valuable and limited resources

and by alienating law-abiding members of the community who are members of the targeted race: *Peart*, para. 93.

21. Racial profiling is not the same as racism. It can be conscious or subconscious/unconscious on the part of the officer. Either way it can be hard to prove. The officer is not likely to admit that he consciously engaged in profiling and, if subconscious, will not even be aware of having done so. By the same token, an allegation of racial profiling can be difficult to disprove.

22. Direct evidence of racial profiling will rarely be available. It will usually have to be proven circumstantially. Where circumstances relating to police interaction with the subject correspond to the phenomenon of racial profiling, (the "correspondence test") the required inference may be drawn. For example, in *Brown* the scenario of the police stopping a new high-end vehicle for speeding after seeing that it was being driven by a casually dressed young black man was considered to be circumstantially capable of supporting a conclusion of racial profiling.

23. Importantly, racial profiling can be found regardless of whether the police conduct could otherwise be justified. *Dudhi*, paras. 56-65. For example, a police officer who sees a vehicle speeding and decides to pull the vehicle over *in part because of the driver's colour* is engaged in racial profiling even though the speeding could have justified the stop: See *Peart*, para. 91.

24. The absence of any valid or believable explanation for police action can be a significant circumstance supporting a finding of racial profiling. On the other hand, the presence of a proper reason for the police action may be a factor that can tend to rebut any such inference. (as in *Peart)*

25. The mere fact that a driver is Black to the knowledge of police is insufficient to satisfy the burden. If it were otherwise, a different law would apply to a large segment of the population and the exercise of police powers would be race-dependent. For example, the power to conduct random traffic stops would be at least *prima facie* illegitimate and could not be exercised in respect of Black drivers.

26. As re-affirmed in *Peart*, the onus to establish racial profiling is on the defendant/applicant on a balance of probabilities. [7]

27. In this case the applicant relies on the following factors to support an inference that the stop was a pretext and/or it was infected by racial profiling:

28. *The officer knew and had noted that the driver was black* – This is true. But it is a common way for police to describe suspects and probably a proper one in many instances such as when a suspect is being sought. However, doing so in the present circumstances seems inappropriate.

29. *There were no grounds to support a suspicion of insobriety or even alcohol consumption:* – While such grounds are not legally required, I think there were some grounds. Cars departing from the area of bars late at night provide a reasonable and grounded basis for suspicion. It may not rise to the level of articulable cause, but it is something beyond total randomness. Further, the stopping of the other non-black motorist for a sobriety check tends to negate any conclusion of pretext or profiling.

30. *The officer lied about seeing the defendant near the entrance to the bar*– I don't think he lied. If the officer was inclined to lie, he could have said that he saw them coming out of the bar rather than just near the door. Further there was no reason to fabricate grounds since grounds were not needed. He may have been mistaken in what he saw from a distance at night. Or the defendant's version may be false or inaccurate. [8]

31. *The officer conducted no investigation of the defendant's sobriety* – It is forcefully argued that the lack of investigation into the defendant's sobriety belies the officer's claim as to his purpose. I disagree. As has often been said, these stops and investigations are very fluid and focus can and often will change quickly. Here the defendant jumped into the back seat suggesting he did not want to be discovered as the driver. He identified himself and was almost immediately found to be a disqualified driver. In the interaction with the officer no indicia of drinking were detected. I do not find it surprising at all that the purpose of checking sobriety shifted and was no longer pursued and that no note of non-indicia was made.

32. *The officer referred to guns as the reason for the stop* – I do not accept the defendant's evidence that the officer told him that the stop was related to guns. At that point PC Reid was alone; both occupants of the car were unrestrained. It seems to me that the last thing a police officer would do is disclose that he was investigating guns for fear of sparking a possible deadly panicked response if there actually had been guns present.

33. *The officer called for back-up* – I do not find it suspicious or unusual that the officer called for back up. It is significant that he did so only at the point that it became apparent that the driver was going to be arrested.

34. *The car was searched for weapons.* – This factor causes me concern. The circumstances of the search, if revealing racial profiling, give rise to a discrete issue under section 8 but can also colour and taint what had gone before, including the stop: *Dudhi*, *supra*, paras. 75-78. I will deal with both of these issues under the next heading.

Section 8 – Unreasonable search

35. The common law authority to search incident to arrest (SITA) is not unlimited. The search must be for the purpose of looking for evidence of the crime for which the arrest is being made or for officer (and public) protection. The power does not depend on there being reasonable and probable grounds to believe that a weapon or other potentially harmful thing is present: see *R. v. Fearon*, 2014 SCC 77 (CanLII), [2014] 3 SCR 621, at para 68. However, it must be for a valid purpose connected to the arrest. The validity of a SITA search depends on what the police were looking for *and why: Fearon supra* at para 21. I think it is analogous to the random stopping power – grounds are not needed but the purposes for which it may be exercised are strictly limited. [9]

36. Clearly the evidentiary justification was not present in this case. Given the nature of the offences for which the arrest was made there would be no evidence to be found. As for the protective rationale, that purpose must be reasonable in the circumstances. It is not sufficient to simply claim "officer safety" as the justification no matter what the circumstances. It must be a realistic concern. At the time of the search in this case the defendant was in custody, handcuffed in a police car. Two additional officers were on scene. [10]

37. I think that the search was a search for weapons, not for officer protection but for other suspected offences, probably involving guns. It was not within the SITA power and was therefore not authorized by law and a violation of section 8.

38. Beyond that it is my view that these circumstances – two young black men in a rental car at night in an area of bars and known for gun and gang activity – betray probable racially stereotypical thinking as a component in the decision to search the car. That would invalidate the search even if it was otherwise legal. [11]

39. That the circumstances correspond to racial profiling is a conclusion that is supported by my own experience, and I would venture to say the unanimous experience of criminal lawyers, prosecutors and judges who deal with these cases on a daily basis. Probably more reliably, they are very similar to the circumstances in *Sitladeen*, *supra*, and *Humphry*, *supra.* [12] Many of these circumstances are also identified in academic commentary as indicia of racial

profiling: See *Tanovich: Applying the Racial Profiling Correspondence Test 2017 64 CLQ 359.*

Conclusions re sections 8 and 9:

40. I find that the warrantless search of the defendant's vehicle was not authorized by law and hence a violation of *Charter* section 8. It was also infected by racial profiling. To be clear I am not finding that officer Reid was or is a racist. I am saying that I am satisfied that consciously or unconsciously he allowed racial stereotypical thinking to play a part in his decision to search the defendant's car.

41. This brings me back to the stop and the question of arbitrary detention under section 9. As mentioned above, an instance of racial profiling occurring later in the police interaction with the defendant can colour earlier parts of the interaction. I have dealt above with the circumstances before the search that are relied upon by the applicant, and I have found that most are explicable on some basis other than racial profiling. Had the interaction ended without the car search, I would not have found either a pretext stop or racial profiling. I have re-examined those circumstances with consideration of the shade thrown by my finding respecting the search and I find that although I am less sure of my original conclusion, I am also not persuaded on a balance of probabilities to the contrary. The sobriety stop of the other non-black motorist still stands as a weighty indication that the officer was legitimately doing what he said he was doing.

42. Does this mean that the applicant has failed to discharge his burden with respect to the stop? The case law uniformly recognizes the difficult burden imposed on a defendant to prove racial profiling – to prove what is in a police officer's mind. I think it would be unreasonable and unfair to further augment that burden with a requirement that the applicant prove with some precision when the tainted thinking first started to occur. In my view in a case such as this, where the interaction is brief and continuous and involves the same officer throughout, the applicant satisfies his burden, at least *prima facie,* if he shows he was subject to racial profiling during any part of that interaction.

43. In this case the applicant has met that burden and established a *prima facie* case of racial profiling. I am unable to conclude that the stop was NOT tainted by the same thinking. Accordingly, I find that there was a section 9 violation as well.

Exclusion of Evidence – 24(2)

44. The only evidence that was obtained in the entire course of the police interaction with the defendant was the defendant's self-identification. But as the driver of a vehicle, he was obligated to give his name: *S 33 HTA*. He therefore had no reasonable expectation of privacy in that information that would engage section 8 of the *Charter*.

45. Put another way, the search of the car – where the defendant had a REP that was section 8 protected – turned up nothing. The acquisition of the name, if it could be considered a search, was not a search that was section 8 protected. The defendant therefore cannot get to 24(2) through section 8 alone, though if 24(2) is reached through another *Charter* violation, the circumstances of the empty search where the racial profiling occurred must figure prominently in the exclusionary analysis.

46. The other violation, as found above, is the section 9 breach. The section 9 detention in this case directly resulted in the obtaining of the name and therefore directly triggers consideration of the exclusionary rule in 24(2).

47. That analysis is unusually straightforward and simple in this case. All of the cases emphasize how serious racial profiling is, though in this case I am not prepared to find that the tainted thinking was other than subconscious. I would rate it as midpoint on the seriousness scale. The impact of the *Charter* infringing practice on the liberty and equality rights of the individual involved and the Black community in general is substantial, corrosive and ever-present. This factor tends strongly towards exclusion. The public interest in trial on the merits is relatively low for this offence – it is not a gun case. In my opinion, the long-term interest in the repute of the administration of justice would best be served by exclusion.

48. The evidence is excluded; the Crown's case lacks proof of an essential ingredient; the charge is dismissed.

March 25 2022

B Duncan J

N Jaswal *for the Crown*

M Little *for the defendant*

[1] This episode was circumstantially confirmed by the defendant who spoke of noticing the “suspicious” unmarked police car in the plaza and that it left and shortly thereafter returned.

[2] LLA s 32(5) as it read at the time permitted search of a vehicle on reasonable grounds to believe there is liquor being unlawfully kept.

[3] According to the officer the stop was at 11:08 and the arrest at 11:09. The defendant thought that about 10 minutes elapsed between the two events.

[4] To check driver sobriety or to check that other highway traffic requirements such as licencing, registration and insurance are being complied with.

[5] The presence in the officer’s mind of other investigative interests does not invalidate the stop as long as one purpose was a *genuine* traffic purpose.

[6] This is universally accepted though in the not-too-distant past it was apparently considered to be legitimate. Police in Canada and the United States were instructed about profiles of certain criminals, such as drug dealers, that included race as a factor; See *R v Campbell* {2005} QJ No 394 para 26

[7] That onus means that the usual rule in W.D. does not apply. Where there is conflict on a point, the defendant must satisfy the court that his evidence on the point is probably true: *R v Hussein* [2018] OJ 5901 and authorities cited therein at paras 13 and 14.

[8] It seems to me to be slightly odd to send one person from the group of four on a recon mission, particularly when they had already parked and got out of the car. The point is quite insignificant anyway.

[9] For the distinction between grounds and purpose see: *R v Ismail* [2021] OJ No 3504 at para 20.

[10] The circumstances here are similar to those present in *R v Bulmer* 2005 SKCA 90 where the Court found that a search of a car was not a proper exercise of the SITA power. I come to the same conclusion here.

[11] It would also invalidate a LLA search even if it was legal.

[12] The majority in *Sitladeen* found the circumstances were consistent with RP. It is implicit in *Humphrey* that the same finding would have been made except that the police had specific information regarding the defendant’s gang affiliation and dangerousness.