CITATION: R. v. Quansah, 2012 ONCA 123
DATE: 20120223
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COURT OF APPEAL FOR ONTARIO

Goudge, LaForme and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Peter Quansah

Respondent

Emile Carrington, for the appellant

Lawrence Greenspon and Eric Granger, for the respondent

Heard: November 30, 2011

On appeal from the order of Justice Hugh R. McLean of the Superior Court of Justice, sitting as a summary conviction appeal judge, dated October 6, 2010, allowing the appeal against the conviction entered by Justice J.M. Bordeleau of the Ontario Court of Justice, dated August 13, 2009.

H.S. LaForme J.A.:

OVERVIEW

[1] Peter Quansah was convicted in the Ontario Court of Justice of driving a motor vehicle with excess alcohol in his blood. On summary conviction appeal a new trial was ordered. The Crown seeks leave to appeal to this court and, if leave is granted, appeals the decision of the summary conviction appeal judge, asking that the conviction be restored.

[2] Mr. Quansah's position on this appeal is that the law of "forthwith" is well settled as it pertains to the circumstances of this case. He says that "forthwith" does not mean "within a reasonable

time" as held by the trial judge and that the summary conviction appeal judge's decision to order a new trial was correct.

BACKGROUND

[3] At approximately 3:03 a.m. Mr. Quansah was observed by a police officer, facing a green light but not moving. The officer approached Mr. Quansah's car and noticed that he was sitting in the driver's seat, with his eyes closed. While attempting to wake Mr. Quansah up, for 10-15 seconds, the officer observed that his eyes were red and bloodshot. Mr. Quansah then proceeded to drive forward through the intersection.

[4] The officer returned to his cruiser and pursued the vehicle, having broadcast over his radio that he was engaged in a pursuit. He was concerned about Mr. Quansah's erratic behaviour and his own personal safety. Mr. Quansah pulled over shortly thereafter, at 3:05 a.m.

[5] The officer ordered Mr. Quansah out of the vehicle and handcuffed him. He noted that Mr. Quansah was unsteady on his feet. Another police officer arrived on the scene at about 3:06 a.m. and noted an odour of alcohol on Mr. Quansah's breath and that his eyes were red, unfocused and glossy.

[6] Between 3:06 a.m. and 3:17 a.m. the first officer conducted a limited search of Mr. Quansah for weapons. During this time period the officers had a short conversation with Mr. Quansah about his alcohol consumption. Mr. Quansah told the police that there was another person in his car, which the first officer found to be incorrect. The first officer walked Mr. Quansah to the second officer's vehicle, 20-30 feet away, in order to be in a safer position on the roadway.

[7] At 3:17 a.m. an approved screening device ("ASD") demand under s. 254(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, was then made. This was because the first officer had formed a reasonable suspicion that Mr. Quansah had consumed alcohol based on his visual and olfactory observations and Mr. Quansah's behaviour at the point of the initial encounter. The first officer, at around 3:20 a.m., then demonstrated the use of the ASD device.

[8] After two insufficient samples, Mr. Quansah's third sample at 3:22 a.m. resulted in a "fail" reading. He was arrested and the first officer informed Mr. Quansah of his right to counsel at 3:23 a.m., read him the standard caution at 3:24 a.m., and made an Intoxilyzer breath demand at 3:27 a.m.

[9] At 3:32 a.m. the first officer commenced transporting Mr. Quansah to the police station, where they arrived at 3:40 a.m. At 3:48 a.m. the police commenced attempts to reach Mr. Quansah's counsel of choice. Once counsel had been reached at 4:01 a.m., Mr. Quansah consulted with counsel for approximately 20 minutes. At 4:37 a.m. Mr. Quansah was transferred to a qualified technician.

[10] Mr. Quansah then provided two suitable samples to a qualified breath technician: the first at 4:41 a.m. and the second at 5:01 a.m. The results of the two samples were blood-alcohol readings of 126 mg of alcohol per 100 ml of blood and 115 mg of alcohol per 100 ml of blood.

The proceedings below

[11] The trial judge dismissed an impaired charge against Mr. Quansah and reserved judgment on an "over 80" charge. Several months later, Mr. Quansah was convicted of "over 80". The trial judge's oral reasons included the following statement of the governing law:

> The second argument advanced by the applicant is that the demand for the roadside test was not forthwith. The evidence is clear that the police had a roadside instrument with them. I am satisfied that forthwith means within a reasonable time. Taking into account, all the circumstances during the time before the demand, there was no realistic opportunity for the accused applicant to consult counsel, and I find that his Section 10 rights were not breached. [Emphasis added.]

[12] The summary conviction appeal judge held that the trial judge erred in his application of the principles set out in *R. v. Woods*, 2005 SCC 42, [2005] 2 S.C.R. 205. He found that the trial judge's analysis "is far different from the analysis that Mr. Justice Fish makes in his definition or his finding that 'forthwith' means immediately or without delay." The appeal judge ordered a new trial, from which the Crown seeks leave to appeal.

The leave to appeal

[13] The Crown raises as a question of law of general importance to the administration of justice whether the summary conviction appeal court applied the wrong test for "forthwith" in s. 254(2) of the *Code*, and therefore erred in concluding that the trial judge applied an incorrect test for "forthwith". In my view, that is an issue that warrants the granting of leave to appeal to this court.

[14] As a result, we are yet again asked to consider what the "forthwith" requirement in s. 254(2) means. For ease of reference, the relevant part of s. 254(2) reads:

> (2) If a peace officer has reasonable grounds to suspect that a person has alcohol ... in their body and that the person has, within the preceding three hours, operated a motor vehicle ... the peace officer may, by demand, require the person ...
>
> > (b) *to provide forthwith a sample of breath* that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose. [Emphasis added.]

The arguments

[15] The Crown contends first that "forthwith" requires only that there be compliance with a valid demand before the detainee realistically could consult with counsel. That is to say, the only time constraint is whether the sequence of events between the police officer forming grounds to make an ASD demand, and the detainee responding to the demand, occurs faster than the time in which the detainee realistically could consult with counsel.

[16] Second, the Crown argues that the summary conviction appeal judge erred in equating "forthwith" with "immediately" and in finding that the trial judge was wrong in holding that "forthwith means within a reasonable time".

[17] Mr. Quansah submits that "forthwith" does not mean "within a reasonable time". He argues that it means "immediately or without delay", unless the delay is reasonably necessary, i.e., a delay that is necessary in the circumstances of the case. His position is that where an officer makes an ASD demand, the demand must be made forthwith upon the officer forming the opinion that the demand is justified, and the sample must be provided forthwith. More specifically, it must be "immediate" or "without delay" unless there is a "reasonably necessary delay".

ANALYSIS

The context

[18] The meaning to be given to s. 254(2) must be informed by its purpose. Parliament created a two-step detection and enforcement procedure in s. 254 that necessarily interferes with rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*. First, s. 254(2) authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to provide breath samples for testing on an ASD. These screening tests, at or near the roadside, determine whether more conclusive testing is warranted.

[19] Second, s. 254(3) allows peace officers who have the requisite reasonable and probable grounds – usually obtained from the ASD test – to demand breath samples for a more conclusive breathalyzer analysis. Breathalyzers determine precisely the alcohol concentration in a person's blood and thus permit peace officers to ascertain whether the alcohol level of the detained driver exceeds the limit prescribed by law.

[20] As our courts have often noted, this two-step process provides the police with a powerful tool to curtail, investigate and prosecute drinking and driving related offences. The deaths and substantial societal costs associated with drinking and driving fully justify the existence of this procedure: see *R. v. Degiorgio*, 2011 ONCA 527, 279 O.A.C. 386, at para. 41.

[21] The "forthwith" requirement of s. 254(2) is inextricably linked to its constitutional integrity: see *Woods*, at para. 29. This justifies what would otherwise be sustained as violations of ss. 8, 9 and 10(b) of the *Charter*. Thus, in interpreting "forthwith", this court must bear in mind Parliament's choice of language and Parliament's intention, which is to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights: see *Woods*, at para. 29.

[22] So long as the demand is validly made pursuant to s. 254(2) – that is, so long as it is made "forthwith" – for *Charter* purposes there is no unjustified seizure or arbitrary detention or breach of the requirement to advise the detainee of his or her right to counsel. This is because this statutory detection and enforcement procedure constitutes a reasonable limit on *Charter* rights, given the extreme danger represented by unlicensed or impaired drivers on the roads: see *Degiorgio*, at para. 37.

[23] As this court noted in *Degiorgio*, at para. 46, the "forthwith" period is the time in which *Charter* rights are justifiably infringed. That is to say, within this time a detained person can be required to comply with an ASD demand and respond to that demand – be it blowing and registering a "fail" or be it refusing or failing to blow – and incur criminal liability that is justified despite ss. 8, 9 and 10(b) of the *Charter*.

The forthwith requirement

[24] As I noted, the Crown argues that the only criterion to be assessed in determining whether the "forthwith" requirement has been met is whether the demand and the response to the demand take place before there is a realistic opportunity to consult counsel. As I will explain, this is an incomplete approach to assessing compliance with the immediacy requirement.

[25] Section 254(2) does not explicitly require that the police officer's demand be made "forthwith"; rather, it only specifically requires that the motorist provide a breath sample "forthwith". However, Arbour J.A. in *R. v. Pierman; R. v. Dewald* (1994), 1994 CanLII 1139 (ON CA), 19 O.R. (3d) 704 (C.A.), at para. 5, held that "it is implicit that the demand must be made by the police officer as soon as he or she forms the reasonable suspicion that the driver has alcohol in his or her body." In that same paragraph she reasons that:

> This is the only interpretation which is consistent with the judicial acceptance of an infringement on the right to counsel provided for in s. 10(b) of the *Charter*. If the police had discretion to wait before making the demand, the suspect would be detained and therefore entitled to consult a lawyer.

[26] *Woods* confirms this and reasserts that the constitutional validity of s. 254(2) depends on its implicit and explicit requirements of immediacy. This immediacy requirement is implicit for the police demand for a breath sample and explicit for the mandatory response: the driver must provide a breath sample "forthwith". The term "forthwith" in s. 254(2), therefore, means "immediately" or "without delay" and indicates a prompt demand by the peace officer and an immediate response by the person to whom that demand is addressed: see *Woods*, at paras. 13-14 and 44. However, in unusual circumstances "forthwith" may be given a more flexible interpretation than its ordinary meaning strictly suggests: see *Woods*, at para. 43.

[27] *Woods* sets out the correct approach to assessing the implicit and explicit immediacy requirements and whether they are met in any particular case. The approach begins with underlining the constitutional integrity of s. 254(2). That integrity depends on interfering with *Charter* rights, but only in a manner that is "reasonably necessary" to keep impaired drivers off the road: see *Woods*, at para. 30. The two critical *Charter* rights are s. 10(b) rights and s. 9 rights, although s. 8 rights are at stake as well.

[28] For years this court has recognized that "forthwith", or the immediacy requirement, called for some flexibility in its interpretation. For example, s. 254(2)(b) mandates that "a proper analysis" be made and thereby "incorporates an element of accuracy": see *Pierman*, at para. 21. Consequently, if the circumstances dictate that a "short delay" is necessary for the officer to obtain an accurate result, the officer is justified in delaying either the making of the demand or the administration of the test after the demand: see *Pierman*, at para. 21.

[29] This "flexibility" was adopted by the Supreme Court of Canada in *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 S.C.R. 254. Sopinka J., at para. 73, agreed that "waiting 15 minutes is permitted under s. 254(2) of the *Code* when this is in accordance with the exigencies of the use of the equipment", provided the officer is aware of the potential inaccuracy of the equipment. He went on to say in the same paragraph that such a delay "is in accord with the purpose of the statutory scheme and ensures that a police officer has an honest belief based on reasonable and probable grounds prior to making a breathalyzer demand."

[30] In *R. v. Au-Yeung*, 2010 ONSC 2292 (CanLII), T. Ducharme J. notes that unfortunately this recognition of the need for some delay has been taken to mean that a police officer is not required to make an ASD demand as soon as he or she forms the reasonable suspicion that the driver has alcohol in his or her body. He disagrees with such an interpretation and so do I.

[31] This court has made it very clear that *Bernshaw* is not authority for the principle that any delay of 15 minutes or less before making the demand meets the forthwith requirement, "no matter what the reason for the delay": see *R. v. George* (2004), 2004 CanLII 6210 (ON CA), 187 C.C.C. (3d) 289 (Ont. CA), at para. 50. As Gillese J. went on to note in that same paragraph, "*Bernshaw* sanctioned a delay required in order to obtain a proper breath sample." That is, the delay in *Bernshaw* was a short delay reasonably necessary for the officer to do the job required by s. 254(2).

[32] Most recently, *Woods* endorses *Bernshaw* and acknowledges that while "forthwith" may be interpreted with some flexibility, this should only be done in "unusual circumstances" such as those involving the "exigencies of the use of the equipment": see *Woods*, at para. 43.

[33] As I noted earlier, the Crown argues that the only circumstance in which the "forthwith" requirement is exceeded is where there is sufficient delay such that a realistic opportunity to consult counsel was available but not provided.

[34] I do not agree. There is no doubt that if there has been a realistic opportunity to consult counsel that has not been accorded to the detained person when the sample is demanded and the person has responded to the demand by either providing the sample or refusing to blow, the "forthwith" requirement is not met. That is clear from the many cases in which this was the sole issue. See, for example, the following cases in this court: *R. v. George*; *R. v. Torsney*, 2007 ONCA 67, 217 C.C.C. (3d) 571; *R. v. Latour* (1997), 1997 CanLII 1615 (ON CA), 34 O.R. (3d) 150 (C.A.); *R. v. Danychuk* (2004), 2004 CanLII 12975 (ON CA), 70 O.R. (3d) 215 (C.A.). However, I do not think that these cases canvass – let alone reject – the notion that there are other criteria applicable to assess the "forthwith" requirement.

[35] Moreover, it is clear from Supreme Court of Canada jurisprudence that the opportunity to consult counsel is not the only criterion for assessing whether the "forthwith" requirement has been observed.

[36] In *R. v. Grant*, 1991 CanLII 38 (SCC), [1991] 3 S.C.R. 139, Mr. Grant was stopped and kept in the police car at the roadside for 30 minutes awaiting the arrival of the ASD. The court found on this basis alone that the "forthwith" requirement was not met. There was no analysis at all of whether there could have been a realistic opportunity to consult counsel. Writing for the court, Lamer C.J. said this at p. 150:

> Without delving into an analysis of the exact number of minutes which may pass before the demand for a breath sample falls outside of the term "forthwith", I would simply observe that where, as here, the demand is made by a police officer who is without an A.L.E.R.T. unit and the unit does not, in fact, arrive for a half hour, the provisions of s. 238(2) [the equivalent of s. 254(2)] will not be satisfied.

[37] *Woods* is equally clear. Mr. Woods was stopped by officers who formed the necessary reasonable suspicion and made a demand that he provide a breath sample. Mr. Woods refused, was arrested for so doing, and was taken to the station. There he was given his s. 10(b) rights and in fact spoke with counsel by telephone. Over an hour after the officers' reasonable suspicion and his arrest, a second demand was made and Mr. Woods complied. The court found that this did not meet the "forthwith" requirement. There was no need to consider whether Mr. Woods could have been

accorded his s. 10(b) rights before the sample was obtained. He had already been accorded them. The determination that the "forthwith" requirement had not been met was clearly not based on the criterion of whether there was a realistic opportunity to consult counsel.

[38] Moreover, there are a number of examples of cases (in addition to *Grant* and *Woods*) in which delays are tested against the "forthwith" requirement without using the opportunity to consult counsel as the criterion. I have referred to *Bernshaw*, which held that a delay of 15 minutes before administering the ASD test is acceptable if necessary in order to obtain a proper sample. I will refer to a few other examples.

[39] In *R. v. Megahy*, 2008 ABCA 207, 432 A.R. 223, the "forthwith" requirement was found to have been exceeded because the officer, who was assigned to the roadside check program, did not keep the ASD at the roadside but instead, with no good reason except personal convenience, kept it a short distance away. The delay in *Megahy*, even though of a short duration, was found to exceed the "forthwith" requirement because it was not reasonably necessary.

[40] In *R. v. Fildan* (2009), 2009 CanLII 45315 (ON SC), 69 C.R. (6th) 65 (Ont. S.C.), several additional examples are recited where, despite a short delay, the immediacy requirement would be met. At para. 39, Hill J. describes three of them:

> (1) Where the police officer takes further reasonable steps (such as sobriety and physical coordination tests) to determine whether there are reasonable grounds for an intoxilyzer demand (*R. v. Smith* (1996), 1996 CanLII 1074 (ON CA), 105 C.C.C. (3d) 58 (Ont. C.A.) at para. 19, 27, 57) or
>
> (2) Where the officer asks questions to learn the amount of alcohol said to have been consumed - with confidence that only one drink was consumed, the constable may direct the motorist on his or her way: (*Megahy*, at para. 17-8), or
>
> (3) Where legitimate public safety or similar exigencies arise justifiably explaining a brief delay preventing immediate communication of a formed intention to demand and undertake ASD testing.

[41] In my view, all these examples are instances where the assessment of the "forthwith" requirement is based on whether a short delay is reasonably necessary to accomplish the objectives of s. 254(2).

[42] Thus, I would reject the Crown's argument. While it is true that if the sample is not obtained before there is a realistic opportunity to consult counsel that was not provided, the immediacy requirement is not met, the reverse is not true. If the sample is obtained before that but only after a delay longer than is reasonably necessary for the purposes of s. 254(2), it will also fail the immediacy requirement.

[43] The Crown's second argument is that the trial judge was correct to conclude that "forthwith" means "within a reasonable time".

[44] I do not agree. This definition simply cannot stand with the principled approach to "forthwith" articulated in *Woods*, at paras. 43-44:

> It is true, as I mentioned earlier, that "forthwith", in the context of s. 254(2) of the *Criminal Code*, may in unusual circumstances be given a more flexible interpretation than its ordinary meaning strictly suggests.
>
> ...
>
> The "forthwith" requirement in s. 254(2) appears to me, however, to connote a prompt demand by the peace officer, and an immediate response by the person to whom that demand is addressed.

Summary

[45] In sum, I conclude that the immediacy requirement in s. 254(2) necessitates the courts to consider five things. First, the analysis of the forthwith or immediacy requirement must always be done contextually. Courts must bear in mind Parliament's intention to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights.

[46] Second, the demand must be made by the police officer promptly once he or she forms the reasonable suspicion that the driver has alcohol in his or her body. The immediacy requirement, therefore, commences at the stage of reasonable suspicion.

[47] Third, "forthwith" connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation of reasonable suspicion to the making of the demand to the detainee's response to the demand by refusing or providing a sample must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2).

[48] Fourth, the immediacy requirement must take into account all the circumstances. These may include a reasonably necessary delay where breath tests cannot immediately be performed because an ASD is not immediately available, or where a short delay is needed to ensure an accurate result of an immediate ASD test, or where a short delay is required due to articulated and legitimate safety concerns. These are examples of delay that is no more than is reasonably necessary to enable the officer to properly discharge his or her duty. Any delay not so justified exceeds the immediacy requirement.

[49] Fifth, one of the circumstances for consideration is whether the police could realistically have fulfilled their obligation to implement the detainee's s. 10(b) rights before requiring the sample. If so, the "forthwith" criterion is not met.

Application to this case

[50] The summary conviction appeal judge appears to have proceeded on the basis that the meaning of "forthwith" in s. 254(2) must be strictly defined as "immediately" or "without delay", and that the trial judge was wrong to proceed on the basis that the strict definition of "forthwith" is "within a reasonable time".

[51] In my view, the summary conviction appeal judge erred in proceeding in this way. As I have attempted to demonstrate, either of these definitions, if applied rigidly, is wanting. While many if not most cases will permit proceeding without delay, some circumstances will require a flexible approach. A

short delay if reasonably necessary for the proper administration of the roadside test must be accommodated if the purpose of the legislative provision is to be realized.

[52] In my respectful opinion, articulation of the precise linguistic equivalent for "forthwith" is less important than a careful consideration of all the circumstances of the particular case. The legal context for this consideration is the objective that "forthwith" sets out, namely a prompt demand and an immediate response, ultimately taking no more than the time reasonably necessary for the prompt performance of the steps contemplated by s. 254(2).

[53] Had the summary conviction appeal judge proceeded on this basis, he would have sustained the conviction. On the facts as found by the trial judge, there can be little doubt that no more than the time reasonably necessary to enable the officer to do his duty elapsed between the stop and the providing of the sample.

[54] The time that elapsed was 17 minutes at the most, during which, because Mr. Quansah had just sped away from him, the officer understandably conducted a limited search of his car for weapons, had a short conversation with him about his alcohol consumption, and checked out the assertion that there was another person in the car with him. Having formed the required reasonable suspicion, the officer made the demand and Mr. Quansah provided the sample. In these circumstances, the 17 minute delay was reasonably necessary for the officer to properly perform his task.

[55] I would therefore grant leave, allow the appeal, and restore the conviction.

RELEASED:

"FEB 23 2012"

"H.S. LaForme J.A."

"STG" "I agree S.T. Goudge J.A."

"I agree Paul Rouleau J.A."