

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HIS MAJESTY THE KING

– and –

GIANMARCO DI LUCIANO

Defendant

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) *Philip Hsiung* for the Crown
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) *Michael Lacy* for Mr. Di Luciano
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) **HEARD:** March 4, 2024

**RULING ON A DEFENCE MOTION TO
RE-OPEN A CHARTER APPLICATION**

C. BOSWELL J.

[1] Mr. Di Luciano was arrested and charged with impaired operation of a motor vehicle on Christmas Day 2019. On three occasions following his arrest, the police demanded that he provide a sample of his breath for analysis. Each time he refused.

[2] In a pre-trial application, Mr. Di Luciano sought to exclude evidence of the breath demands and his refusals from evidence at his trial, alleging that a number of his *Charter* rights were infringed during the course of the police investigation.

[3] I granted the application in part, for reasons reported as 2023 ONSC 6219. Significantly, however, I found that:

- (a) The arresting officer, PC Shannon Swiderski, had reasonable grounds to arrest Mr. Di Luciano for impaired operation. In other words, I found that he was lawfully arrested; and,
- (b) A demand for a sample of his breath made by a breath technician had been made lawfully. It was not tainted by any prior *Charter* breach and was admissible in evidence against him.

[4] Mr. Di Luciano’s trial proceeded before a jury in November, 2023. As a result of certain testimony given by PC Swiderski at trial, defence counsel argues that I should re-open the *Charter* application and consider anew my findings that Mr. Di Luciano had been lawfully arrested and that the breath technician’s demand was lawfully made. To be more specific, counsel urges me to rethink the

arresting officer's credibility, in light of her trial testimony, and conclude that she did not have honest, subjective grounds to believe that Mr. Di Luciano had operated a motor vehicle at a time when his ability to do so was impaired by alcohol. Such a conclusion would undermine the lawfulness of the arrest and the breath technician's demand for reasons I will explain momentarily.

[5] First, a brief recap of the proceedings to date will aid in placing the arguments on this motion into context.

RECAP

[6] Mr. Di Luciano was travelling eastbound on Major MacKenzie Drive at about 10:45 p.m. on Christmas Day 2019. He was driving a Toyota Sequoia SUV. The applicable speed limit was 60 km/hr. Mr. Di Luciano was driving up to 120 km/hr. He ran a red light at the intersection of Major MacKenzie and Fossil Hill Road and "T-boned" an SUV, with three occupants, waiting in the intersection to make a left turn from Fossil Hill Road onto Major MacKenzie.

[7] The collision ultimately gave rise to a number of charges. By the time the case was ready for trial, Mr. Di Luciano faced nine counts: dangerous operation of a motor vehicle causing death, dangerous operation causing bodily harm (x2), impaired operation causing death, impaired operation causing bodily harm (x2), refusal to provide a breath sample causing death, and refusal causing bodily harm (x2).

[8] Mr. Di Luciano was arrested at the scene of the collision and initially charged with impaired operation of a motor vehicle and driving with a blood alcohol concentration equal to or greater than 80 mg of alcohol in 100 mL of blood. I ruled that the Over 80 charge was unlawful because it was laid at a time when the arresting officer did not have any evidence about the concentration of alcohol in Mr. Di Luciano's blood.

[9] While still at the collision scene, PC Swiderski made a demand for a sample of Mr. Di Luciano's breath. More specifically, she demanded that he provide a sample into an approved screening device ("ASD"). He refused to do so. I ruled that the demand was unlawful because PC Swiderski did not actually have an ASD in her possession. I found that it was a breach of Mr. Di Luciano's s. 8 *Charter* right and excluded evidence of the first refusal under s. 24(2) of the *Charter*.

[10] Mr. Di Luciano was conveyed to the police station. He was booked in by Acting Staff Sergeant Cathy Armstrong. During the booking process, PC Swiderski made a second demand for a sample of Mr. Di Luciano's breath. He again refused. I ruled that the second demand breached Mr. Di Luciano's s. 8 and 10(b) rights and I excluded evidence of his second refusal under s. 24(2).

[11] After being booked into the station, Mr. Di Luciano was provided with an opportunity to speak to legal counsel. While he was consulting with counsel, PC Swiderski advised the breath technician – PC Wade Neathercott – of her grounds for arresting Mr. Di Luciano for impaired operation. PC Neathercott relied on those grounds to subsequently make a demand for a sample of Mr. Di Luciano's breath after he was finished consulting with counsel. Mr. Di Luciano refused PC Neathercott's demand.

[12] Amongst other relief pursued on the *Charter* application, Mr. Di Luciano sought the exclusion from evidence of his refusal to the breath technician's demand. I concluded, however, that it had not been obtained in a manner that breached any of his *Charter* rights. Moreover, I ruled that even if it had been obtained unconstitutionally, I would not have excluded it under s. 24(2).

[13] After I released my ruling on the *Charter* motions, Mr. Di Luciano applied to sever the refusals counts from the dangerous operation and impaired operation counts. I granted that application with the refusals counts to proceed as a judge alone trial immediately following the jury trial on the other counts.

[14] The trial of the dangerous operation and impaired operation counts proceeded before a jury between November 15, 2023 and November 24, 2023. The jury returned the following verdicts:

- (a) Not guilty of any of the impaired operation counts;
- (b) Not guilty of either dangerous operation causing bodily harm counts, but guilty of dangerous operation simpliciter on both; and,
- (c) Not guilty of dangerous operation causing death, but guilty of dangerous operation causing bodily harm.

[15] At the request of Mr. Di Luciano's counsel, and unopposed by the Crown, I stayed the two convictions for dangerous driving simpliciter on the basis that they were subsumed in the conviction for dangerous driving causing bodily harm. In other words, all three convictions arose from the same delict.

[16] Sentencing was put over to March 4, 2024, along with the trial of the refusal counts.¹ Prior to that date, defence counsel filed this motion to re-open the *Charter* application seeking exclusion of the breath technician's demand and Mr. Di Luciano's corresponding refusal. The principal ground for the motion was set out as follows:

PC Swiderski gratuitously exaggerated her evidence at trial which detracts from her credibility. The Applicant submits this is a material change in circumstances which requires this Court to reconsider the earlier finding that (a) she had honest and subjective grounds to arrest the Applicant for impaired operation, and relatedly, (b) that since the Applicant was lawfully arrested and detained, the breath room refusal was not obtained in a manner that infringed his *Charter*-protected interests.

THE GOVERNING PRINCIPLES

[17] The principles that govern this motion are straightforward and well-settled. Interlocutory orders relating to the conduct of a trial may be varied or revoked in the event of a material change in circumstances. If such a change occurs, either party may request that a previous evidentiary ruling be re-visited. See *R. v. Adams*, [1995] 4 S.C.R. 707, at para. 30; *R. v. La*, [1997] 2 S.C.R. 680, at para. 28; *R. v. R.V.*, 2019 SCC 41, at para. 74.

¹ Subsequent to the jury's verdict, and in light of certain findings made by the jury, the Crown elected to pare down the refusals counts to one count of refusal causing bodily harm. It is unnecessary for the purposes of this ruling to elaborate on the basis for the Crown's decision.

[18] The burden of establishing a material change in circumstances falls on the party seeking to vary the earlier order. The moving party must establish that a change in circumstances has occurred and that change, had it been known at the time of the initial order, would likely have resulted in an order on different terms. See *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, at para. 55.

[19] In light of these simple principles, two questions must be answered to dispose of this motion:

- (i) Has there been a change in circumstances?
- (ii) Would the changed circumstances likely have resulted in a different order?

[20] I will consider these questions in turn.

ANALYSIS

(i) **Has there been a change in circumstances?**

[21] Answering this first question requires an examination of the changing testimony of the arresting officer between the *voir dire* and the trial.

The Voir Dire Evidence

[22] A preliminary hearing was waived in this proceeding. PC Swiderski first testified about her arrest of Mr. Di Luciano during the *Charter voir dire*.

[23] She testified in chief that she was on duty in a patrol car on Christmas night 2019. She responded to a dispatch call at about 10:47 p.m. regarding a motor vehicle collision. The information she got from dispatch was that a vehicle was “all over the road” and had caused an accident. There was a car on the median and someone was trapped in one of the involved vehicles.

[24] PC Swiderski arrived on scene at about 10:51 p.m. She saw that there was an SUV on the median that had severe damage to the rear driver’s side. Her first concern was for the occupants of that vehicle.

[25] Soon after she arrived, EMS attended the scene. PC Swiderski then turned her attention to the second vehicle involved in the collision – a black SUV in the curb lane roughly 200 metres east. She walked in its direction. She observed two males walking away from the SUV and towards her. One – later identified as Michael Bonello – was supporting the other – later identified as Mr. Di Luciano.

[26] According to PC Swiderski, Mr. Bonello told her that the person he was supporting was the driver. She said she noticed that his footing was staggered. When she approached him she noticed that his eyes were bloodshot and watery. His reaction time seemed to her to be delayed. When standing still he appeared to sway. And he had “an odour of alcohol about him.”

[27] She said she formed the grounds to believe Mr. Di Luciano was impaired and she arrested him for impaired operation.

[28] Under cross-examination, PC Swiderski indicated that she understood the importance of documenting the indicia of impairment that she observed. She also said that the indicia that she

observed at the collision scene remained constant throughout her interactions with Mr. Di Luciano during the night.

The Trial Evidence

[29] At trial, PC Swiderski testified that as she approached the black SUV at the collision scene, she noticed Mr. Bonello assisting the driver of the vehicle. The driver was “unsteady and kind of staggering”. Mr. Bonello, she said, told her that he believed the driver was intoxicated by alcohol.

[30] She said that as she approached Mr. Di Luciano, she noticed that his eyes were watery and red, he didn’t seem to be focused on anything, and he seemed somewhat dishevelled. When he stood still, he was swaying from side to side and appeared to need support to stand still. She asked him if he was injured and when he answered “no”, she could smell alcohol on his breath.

[31] She was asked by Crown counsel, “Could you describe...the strength or, or weakness, or faintness, of the odour of alcohol that you smelled?” She answered, “It was a very strong smell. Very. He – for lack of a better word – he ‘reeked’ of alcohol.”

[32] PC Swiderski’s demeanour while answering the Crown’s question is also of some significance. In my recollection, as she answered the question, she turned towards the jury and emphasized the word “reeked”.

[33] Under cross-examination, she doubled down on her testimony. The following exchange took place, as she was questioned by Mr. Lacy:

Q: ...You’ve described today that he reeked of alcohol, right?

A: Yes.

Q: Not just a strong odour, reeked of it?

A: Yes.

Q: It was just omnipresent, it was so obvious that it reeked everywhere, correct?

A: Yes. I was in very close proximity to him and it was a very strong smell.

...

Q: ...it reeked, it would have been obvious to anyone who had any close interaction with him, that’s what you’ve said, right?

A: Yes.

[34] She agreed that she had not used the word “reeked” in the contemporaneous notes she made of her interactions with Mr. Di Luciano. She said instead that there was “a strong smell of alcohol.” She acknowledged that her testimony at trial was the first time she described, on the record, Mr. Di Luciano “reeking” of alcohol.

[35] She confirmed that the same indicia she observed at the site of the collision persisted until the end of Mr. Di Luciano's interaction with the breath technician, including the odour of alcohol and the unsteadiness on his feet.

Conclusion

[36] As I expressed to counsel during the argument of the motion, I am satisfied that PC Swiderski's evidence changed from the *voir dire* to the trial.

[37] To be fair, she was not asked directly, during the *voir dire*, to describe the potency of the odour of alcohol she said she smelled on Mr. Di Luciano's breath prior to arresting him. That said, she was certainly asked about the indicia of impairment that she observed, and she said only that she noticed an odour of alcohol. There was no mention of him "reeking" of alcohol. She also acknowledged the importance of documenting any observed indicia of impairment in her notebook. Her notes reflect that she observed a "strong" odour of alcohol. Again, the term "reeked" does not appear.

[38] The use of the word "reeked" to describe the odour of alcohol on Mr. Di Luciano's breath appeared for the first time in PC Swiderski's trial testimony. One might argue, I suppose, that to "reek" of something is to smell strongly of it. In that sense, her use of the term "reeked" is arguably not inconsistent with the contemporaneous notes she made of her observations.

[39] My view, however, is that PC Swiderski's use of the word "reeked" was meant to convey to the jury that she observed a very strong stench of alcohol. I say that in part because of the emphasis she put on the word "reeked" as she described the smell. I was left with the distinct impression that she was gilding the lily in an effort to persuade the jury that Mr. Di Luciano was impaired.

[40] I am satisfied that her testimony regarding the potency of the odour of alcohol she observed on Mr. Di Luciano's breath changed from the *voir dire* to the trial.

(ii) Would the Changed Testimony Likely Have Made a Difference?

[41] To constitute a *material* change in circumstances, the new evidence offered by PC Swiderski at trial must be such that it is reasonable to think that it would likely have affected the outcome of the *voir dire*. In other words, to trigger a reconsideration of my *Charter* ruling, Mr. Di Luciano must satisfy the court that if PC Swiderski's changed evidence had been known at the time of the *voir dire*, it would likely have resulted in a different conclusion about her reasonable grounds to arrest Mr. Di Luciano and to demand a breath sample.

[42] Assessing the materiality of the changed testimony requires a brief review of my findings from the *Charter voir dire*.

Findings from the Voir Dire

[43] PC Swiderski's credibility was a matter of controversy during the *voir dire*. In submissions made at the conclusion of evidence, defence counsel urged the court to find that PC Swiderski was not a credible witness and to reject her testimony that she formed the subjective grounds that Mr. Di Luciano's ability to operate a motor vehicle was impaired by alcohol.

[44] Those grounds were of vital concern, of course, to the Crown's case on the impaired operation charges and the refusal charges.

[45] To lawfully arrest Mr. Di Luciano for impaired operation, PC Swiderski was required to have reasonable grounds to do so. Reasonable grounds is a standard that contains both subjective and objective elements. PC Swiderski must, therefore, have subjectively believed that Mr. Di Luciano had operated a conveyance while his ability to do so was impaired to any degree by alcohol. Her subjective grounds must have been objectively reasonable. See *R. v. Tim*, 2022 SCC 12, at para. 24.

[46] Similarly, to make a lawful demand for a breath sample into an approved instrument, a police officer must have reasonable grounds to believe that a person has operated a conveyance while the person's ability to do so was impaired to any degree by alcohol. See s. 320.28 of the *Criminal Code*. Again, the reasonable grounds standard contains both subjective and objective elements.

[47] In the result, had I concluded that PC Swiderski did *not* have reasonable grounds to believe that Mr. Di Luciano had operated his vehicle while his ability to do so was impaired by alcohol, a number of conclusions would have followed, including:

- (a) Her arrest of Mr. Di Luciano for impaired operation would have been unlawful;
- (b) PC Neathercott's demand for a sample of Mr. Di Luciano's breath would have been unlawfully made, given that it was entirely dependent on PC Swiderski's grounds; and,
- (c) Mr. Di Luciano's refusal would have been evidence obtained in a manner that infringed his *Charter*-protected interests, as a result of its connection to both the unlawful arrest and the unlawful breath demand. This conclusion would have triggered an analysis under s. 24(2) as to whether the refusal should be excluded from evidence.

[48] Defence counsel focused on a number of aspects of PC Swiderski's testimony on the *voir dire* in an effort to undermine her credibility, including, but not limited to:

- (a) She was a fairly inexperienced officer who made a number of significant mistakes in her investigation on the occasion in issue;
- (b) She had minimal interaction with Mr. Di Luciano prior to arresting him. Indeed, the defence position was that she walked right up to him and put the cuffs on him without realistically having had the time to make any assessment of his condition;
- (c) She relied on a number of observations to purportedly form her subjective grounds that were at least equally consistent with the fact that Mr. Di Luciano had just been involved in a serious motor vehicle collision; and,
- (d) She said the indicia of impairment that she observed remained constant throughout the night, but the same observations were not made by other officers who interacted with Mr. Di Luciano.

[49] I will take a moment to comment on the evidence of other officers who testified on the *voir dire*.

[50] There were three other officers who interacted with Mr. Di Luciano shortly after his arrest and each of them testified on the *voir dire*.

[51] PC Sahilpreet Deol was a relatively inexperienced officer who was doing front-desk duty when Mr. Di Luciano was brought into the station. He conducted a pat-down search of Mr. Di Luciano in the booking area. He testified that he noticed an odour of alcohol on Mr. Di Luciano's breath. Otherwise, he made no notes of any further indicia of impairment.

[52] Acting Staff Sergeant Cathy Armstrong was the senior officer in charge of the station and the one who booked Mr. Di Luciano into the station. She testified that as she spoke to Mr. Di Luciano in the booking room, she observed that his eyes were red, that he was slurring a little and that he was speaking slowly. She formed the opinion that he may have been consuming alcohol earlier in the evening. She otherwise made no note of any observation of balance issues or an odour of alcohol.

[53] PC Wade Neathercott was an experienced officer who was the on-call breath technician that night. He made no notes about having observed any indicia of impairment. He was in the breath tech room with Mr. Di Luciano for roughly twenty minutes. It is a relatively small room and they were seated across a small desk from one another. He said that if he had observed any indicia of impairment, he would have made a note of them.

[54] The evidence of the Officers Deol and Armstrong provided some, though not especially strong, corroboration of PC Swiderski's subjective grounds. The evidence of Officer Neathercott was not corroborative. Notwithstanding the lack of strong support from other officers' testimony, I found that PC Swiderski *had* formed honest, subjective grounds that Mr. Di Luciano's ability to operate a motor vehicle was impaired by alcohol.

[55] I was satisfied that PC Swiderski's evidence was sufficiently credible and reliable on the issue of her subjective grounds, having regard to all of the surrounding circumstances, known to her at the time of Mr. Di Luciano's arrest, which included:

- (a) PC Swiderski had learned from dispatch that witnesses had reported that Mr. Di Luciano's vehicle was "all over the road" before the collision occurred;
- (b) There had been a serious motor vehicle collision at a controlled intersection, which is circumstantial evidence consistent with impairment;
- (c) When she first observed Mr. Di Luciano, he was being assisted away from his vehicle with the help of another male, Michael Bonello, and appeared unsteady on his feet;
- (d) Mr. Bonello formed the opinion that Mr. Di Luciano was impaired and he expressed that opinion to PC Swiderski;
- (e) PC Swiderski observed that Mr. Di Luciano's eyes were red, he was slurring his words, and he smelled of alcohol. These observations were, to some extent, corroborated by the testimony of S/Sgt. Armstrong and PC Deol; and,
- (f) Mr. Bonello also testified that in his interactions with Mr. Di Luciano, he too observed him to slur his words, be unsteady on his feet, and to smell of alcohol.

[56] I appreciate that the foregoing circumstances are ones that may arguably support the objective reasonableness of a subjective belief that Mr. Di Luciano operated his vehicle while impaired by alcohol. Care must be taken not to conflate evidence going to the officer's subjective belief with evidence going to the objective reasonableness of that belief. That said, I accept that these enumerated factors were known to PC Swiderski at the time she purportedly formed her subjective grounds. They are corroborated. And that corroboration tends to support the credibility of her statement that she formed the belief that Mr. Di Luciano had operated his SUV while impaired by alcohol.

The Parties' Positions

[57] Defence counsel take the position that PC Swiderski embellished her evidence about the odour of alcohol at trial. Citing *R. v. Kiss*, 2018 ONCA 184, at para. 52, they say that the embellishment undermines her credibility. She purposefully exaggerated her evidence in an attempt to influence the jury. Doing so, they say, "calls into question...what she in fact observed and her credibility as a witness overall."

[58] Defence counsel submit that PC Swiderski's trial evidence calls into question the evidence she gave on the *voir dire* and, as such, is a material change justifying a re-opening of the *voir dire*.

[59] Crown counsel takes the position that PC Swiderski's use of the word "reeked" when describing the odour of alcohol emanating from Mr. Di Luciano should not undermine her credibility. He advances two reasons. First, because the trial was the first time she had been specifically asked to give a qualitative assessment of the odour. Second, because "reeked" is synonymous with a "strong odour" and simply another way to explain to the jury the intensity of the odour. It is not inconsistent with the observation recorded in her contemporaneous notes.

[60] Crown counsel submits that, in any event, all of the factors that supported PC Swiderski's credibility during the *voir dire* are still present. Even if the court agrees that she embellished her evidence at trial, it would not undermine the conclusion that she had honestly formed the belief, prior to his arrest, that he had operated his SUV at a time when his ability to do so was impaired by alcohol.

Conclusion

[61] For the reasons I set out earlier, I agree with defence counsel that PC Swiderski's use of the word "reeked" was an embellishment.

[62] At the same time, however, I agree with Crown counsel that had the same evidence been given at the *voir dire*, it would not likely have made a difference.

[63] Recall that there was no preliminary hearing in this case. In the result, the first time PC Swiderski testified about her observations of Mr. Di Luciano prior to arresting him was during the *voir dire*. Had she testified at the *voir dire* that Mr. Di Luciano "reeked" of alcohol, her testimony could only be contrasted with the observation she recorded in her police notebook to the effect that there was a strong odour of alcohol. In my view, to the extent that "strong odour" and "reeked" are inconsistent terms, the inconsistency is of a minor nature.

[64] It was the use of the term “reeked”, coupled with PC Swiderski’s demeanour when she uttered the term before the jury, that supports the conclusion that she was purposefully embellishing.

[65] I am prepared, for the sake of argument, to go a little further and assume that there was a basis during the *voir dire* to conclude that PC Swiderski embellished her description of the potency of the odour of alcohol on Mr. Di Luciano’s breath. Would such a conclusion likely have made a difference? Again, in my view, no.

[66] I reach this conclusion because to find that PC Swiderski did not honestly believe that Mr. Di Luciano had operated his SUV while his ability to do so was impaired, I would have to find that either:

- (a) She did not observe the indicia of impairment that she said she did; or,
- (b) She made the observations she claimed to have made, but nevertheless did not actually form the belief that Mr. Di Luciano was operating his vehicle while impaired by alcohol.

[67] In all of the circumstances, neither of those conclusions would be likely, even if I had found on the *voir dire* that PC Swiderski overstated the intensity of the odour of alcohol.

[68] As for the first possibility, I point out that PC Swiderski’s observations were generally corroborated. For instance:

- Her compendious impression that Mr. Di Luciano was impaired was corroborated by the independent witness, Mr. Bonello, who closely interacted with Mr. Di Luciano and formed the same opinion;
- Her observation that Mr. Di Luciano was unsteady on his feet was corroborated by Mr. Bonello;
- Her observation that Mr. Di Luciano had an odour of alcohol on his breath was corroborated by Mr. Bonello and PC Deol;
- Her observation that Mr. Di Luciano was slurring his words was corroborated by Mr. Bonello and S/Sgt. Armstrong; and,
- Her observation that Mr. Di Luciano had red and watery eyes was corroborated by S/Sgt. Armstrong.

[69] In addition, there were witness accounts that Mr. Di Luciano was “all over the road” immediately prior to the collision.

[70] As for the second possibility, in light of all the prevailing circumstances, it would strike me as unlikely that PC Swiderski would not form the subjective belief that Mr. Di Luciano operated his SUV at a time when his ability to do so was impaired by alcohol.

[71] A conclusion, on the *voir dire*, that she had embellished the potency of the smell of alcohol would undoubtedly be concerning. Purposeful embellishment is dishonest. Having said that, it would not in my view, in all the circumstances, materially affect the conclusion that she had an honest,

subjective belief that Mr. Di Luciano operated his SUV while his ability to do so was impaired. It would suggest to me that she was too earnest in her attempt to persuade others to share her belief.

[72] The requirement that her subjective belief be objectively reasonable in all the circumstances, acts as somewhat of a check on her zeal. Leaving aside the divergent observations of the odour of alcohol, if any, there were sufficient other indicia of impairment to satisfy the objective reasonableness standard.

[73] In the result, I am not satisfied that PC Swiderski's trial testimony constitutes a material change in circumstances that would justify re-opening the *Charter* application. Mr. Di Luciano's motion is therefore dismissed.

C. Boswell J.

Released: March 28, 2023