Ontario Court of Justice

Her Majesty The Queen

Against

Robert Euesden

Reasons for Judgment

Before the Honourable Justice J. Wilson
At Barrie, Ontario, on December 13, 2012

Appearances:

S. Curry	Counsel for the Crown
M. Rombis	Counsel for the Accused

Reasons for Judgment

THE COURT: Good afternoon. So as a results of the events that occurred in Barrie in the early morning if July 31, 2011, Mr. Euesden was charged with failing or refusing without reasonable excuse to comply with a ASD demand made to him by Officer Denaj under section 254(2)(b) of the Code. His trial occurred on July 11th of this year and following submissions made at the conclusion on October the 3rd I ultimately reserved by decision until today.

Cases if this nature can be challenging, and they're often solely driven by their own individual facts. Particularly when they are what they might be described "fail to" cases as opposed to "refuse to" cases, and this case is clearly in the first category.

This distinction of course is between situations where an individual after a demand is made says he or she won't do it and where on the other hand, efforts are made that do not result in a sample that enables a proper analysis to be made. The individuals in the second situation are sometimes described as "feigning" or "faking" it. This case is the second category.

For the most part the facts are straightforward and deal with a brief period of time. Officer Denaj has been a member of the Barrie Police Services since December of 2009 and was working in full uniform in a marked cruiser from 6:00 p.m. on July 30th of last year until 6:00 a.m. on the 31st. he followed a motor vehicle driven by Mr. Euesden southbound on Highway 400 from Bayfield Street to Dunlop Street where they both exited the highway. He made observations of driving that clearly formed a basis for him to stop Mr. Euesden for investigation, which he did at 1:36 a.m. after they had both crossed Dunlop Street and entered on to Cedar Point Drive.

Denaj approached the vehicle and asked Mr. Euesden if he had consumed alcohol. Mr. Euesden immediately replied that he had had two or three glasses of wine.

Denaj properly formed his suspicion and read the ASD demand from his notebook. There is no issue with respect to the wording, and at 1:39 a.m. Denaj requested an ASD be brought to the scene. Officer Breedon arrived with it at 1:42 and Denaj noted that it had been calibrated on July 26th. Once he arrived Officer Breedon stayed near Officer Denaj and Mr. Euesden at the roadside.

Officer Denaj described what next unfolded using, in my view, rather general and generic descriptions of what steps he usually took as opposed to providing specifics of what actually happened on this occasion. He said "I would have explained how it goes, taken the device of the box and ordered him to blow into the machine and you will hear a tone, and keep blowing until I say 'stop'" he said that Mr. Euesden blew into the ASD and was blowing outside the mouthpiece and there was no tone. He could hear hissing and said "and felt air on his hands as he hold the device" while Euesden made what Denaj described as "multiple attempts"; although he could not put a number on it he said it was more than two or three. This occurred while they were all standing at the roadside near the vehicles.

At that point Denaj put a new mouthpiece into the ASD and did a demonstration. He asked Euesden about health issues and Euesden indicated that he didn't have nay. Denaj said that he probably explained it one time along the lines of "Just blow into the machine like a balloon or straw." He said also that he believed that Breedon explained it as well. He testified that Euesden made- sorry, he testified that Euesden blew several more times but didn't provide breath into the machine. He still blew to the side, said Denaj, and his cheeks were puckered out but there was still no tone. He told Euesden at some point the consequences of not providing a sample and warned him that a charge would result and said that this was before his demonstration. He said be believed the machine was working properly and this he arrested Mr. Euesden for this offence at 1:51 a.m.

During cross-examination Mr. Rombis asked about Officer Denaj's training with respect to the ASD. He said that he had some while at Police College at Aylmer and

also some in previous training with the Barrie Police Services. He said " To the best of my recollection" we were told how to operate and use them but there was no special course on it, and he couldn't recall the amount of time that was spent on it. He acknowledged that he had never reviewed the manual with respect to the device. He said he was not familiar with the various error messages that the device might provide and none were recorded on that occasion as he said the machine wouldn't give one without air going though it, although he didn't give his basis for knowing that.

He agreed that Euesden was cooperative and acknowledged consuming alcohol and agreed to do the test. He also agreed that there was no demonstration given before the first test and that the mouthpiece had not been shown to Euesden or examined for obstructions in them. He was not sure how many attempts were before the demonstration as opposed to how many were after it.

Officer Breedon has also been a member of the Barrie Police Services since December 2009. He was also on duty that early morning and brought the ASD to Denaj at 1:42. He said that he saw Denaj "proceed to use it in the usual way" and saw him test it and explain the procedure to the defendant. He then said he saw the defendant try to provide several samples. He would either stop before he was told to or not make a full seal, which is not a word that Denaj used when he testified concerning his instructions to Mr. Euesden. He said, without giving particulars, that Denaj explained it several times and actually demonstrated the device, and after the demo he was still stopping and blowing out of the side of his mouth. Breedon also heard the defendant say that he wasn't sick or suffering from a lung condition. In fact, he said he asked himself if he had a medical issues due to his age. He said he couldn't recall Denaj giving Euesden a direct caution about non-compliance but rather more of an explanation.

Mr. Rombis cross-examined Officer Breedon thoroughly as well. He had made a note that "Male provides several unsuitable samples" but he could not recall the words of

instruction that Denaj had given or the words of explanation during the demo. He said he was providing air into the device but them he would stop. However, contrary to Denaj's recollection, Officer Breedon did recall some tones from the device as the defendant blew. He couldn't recall Denaj saying "Keep going, keep going, you are almost there" but agreed that it was not outside the realm of possibility as he himself sometimes uses those words. He didn't recall a testing or examination of the mouthpieces either, and said it is possible that a mouthpiece defect occurred but they were not collected. He described Mr. Euesden as coherent and cooperative, but he was stopping while blowing outside the mouthpiece as at times he could hear air. Neither officer suggested at any point that Mr. Euesden's ability to operate his motor vehicle was impaired at all by the consumption of alcohol.

Mr. Euesden testified in his own defence. He is 65 years old and divorced with two children. He has no criminal record and is steadily employed with a consulting engineering firm. He testified that he had dinner earlier in the evening with a lady friend and consumed three glasses of wine over a three-hour period. He dropped his friend off at her home not long before he was stopped and he indicated to the officer immediately that he had consumed alcohol and that he would provide the demanded sample. He testified that " No one said do anything different than what I was doing" and that he blew for a long time. He said he couldn't recall any discussion as to what he was doing improperly. He agreed that the officer did a demonstration at some point and at no time did he recall hearing a tone. His evidence was that he "can't say why there was no suitable sample as he tried on numerous occasions for a lengthy period of time."

Ms. Staats, who appeared for the Crown at the trial, cross-examined Mr. Euesden thoroughly. He agreed that he knew that the officer wanted a sample and told him to blow into the machine; however, he couldn't recall the word "seal" on the mouthpiece with his lips. He remained steadfast that Denaj never told him that he was doing it wrong or to form a seal. He did not recall a hissing sound and couldn't feel air blowing back against his face. During cross-examination he acknowledged

that he was told that he could face a criminal charge for not giving a proper sample. He acknowledged as well that Denaj had done a demonstration partway through and that he put his mouth on the mouthpiece and blew into it, but he said he didn't hear a tone at that point either. His evidence was that he paid attention to the instructions but was never told he was blowing outside his mouth. He was just being told to provide another sample, although he himself never asked what he was doing wrong. He recalled being asked about health issues and indicated that he didn't have any. He described the situation as " an off-guard experience" and he had never had to do it before. He summed up his position as "I believe I made a proper attempt many times" and firmly denied the suggestion that he was faking it. He was " I had no idea I was going something wrong or how many times you were required to try to do it."

In this case the Crown bears the onus of proving each element of the offence to the high standard of beyond a reasonable doubt. This is a standard that approached certainly and it far above the civil standard of proof on a balance of probabilities, which simple means that something is more probably than not. As well, Mr. Euesden enjoys the presumption of innocence and the case must be determined by considering the evidence as a whole. It is not a simple credibility contest resolved by choosing one version of events over the other, and, as Mr. Euesden has testified, I must consider his evidence in the light of the three-part direction given to trial judges by the Supreme Court of Canada in R v. WD. Put succinctly that means that if I believe Mr. Euesden he must be acquitted. Even if I don't accept his evidence, if it leaves me with reasonable doubt on any essential element of the offence he must be acquitted as well. And, finally, even if it doesn't leave me with reasonable doubt I must consider whether I accept the Crown's evidence in while or part and only if the evidence that I accept satisfies me beyond a reasonable doubt of his guilt is it proper in law to find him guilty. I'm aware as well that this analysis is applicable to the issue of credibility as ultimately through it to the issue of reliability.

In a case known as R v Lewko found at 2002 SJ No. 622, the Saskatchewan court of appeal outlined the elements of section 254(5) offence as follows: 1. A proper demand; 2. A failure or refusal by the accused person to produce the required sample; 3. The intention of the accused to produce a failure or refusal; 4. Once raised by the evidence the absence of a reasonable excuse.

In this case there is no issue with respect to there being a proper demand. The evidence clearly supports the grounds for it and Mr. Rombis indicated that there was no issue with respect to the wording of it.

The issue of the actus reus of the failure to provide the sample is a live on here to be determined on the whole of the evidence concerning the event in question. With respect to the mens rea of the offence I am aware of Mr. Justice Michael Code's very recent decision in R v Porter released on June 20th of this year and found at 2012 OJ No. 2841 in which he was sitting as a summary conviction appeal judge. Starting at paragraph 33 Justice Code considers the mens rea component, and after analyzing Lewko and other cases concludes that this is an offence of general and not specific intent, and concludes in paragraph 37 that the mens rea of a section 254(5) offence is "Knowledge or awareness of the prohibited act" as opposed to those many cases which interpret the element of the intention as meaning a desire or purpose of bringing about an unsuitable test results, as he mentions in paragraph 33.

Contrasted with Justice Code's decision in Porter is Justice Howden's in R v Gutierrez, 2001 OJ No 3659 where he was also sitting as a summary conviction appeal judge. It is again a case of failing to as opposed to outright refusing to. At paragraph 15 Justice Howden outlines his view of the essential elements to be proven by the Crown and with respect to the mental element he indicates: "The non-compliance by the accused is intention." It does not appear that Justice Howden's decision was brought to the attention of Justice Code when he was deciding Porter, as although it would not be binding on Justice Code it is not mentioned by him at all while many other usually referred to the cases are. It was a result of discovering

Justice Code's quite recent decision while initially considering this case that I asked for further submissions on the intent issue, and they were made to me by Mr. Rombis and Ms. Staats on October the 3rd. Mr. Rombis agreed that there appear now to be two lines of equal authority. He urges me to prefer the reasoning in Gutierrez as opposed to that in Porter. Ms. Staats urged me to follow Porter. She also provided me with two very recent cases on point as well, being the decision of Just DiTomaso in R v Kitchener from August of this year, and found at 2012 OJ No. 3857 where he is sitting as a summary conviction appeal judge, and that of my colleague Justice Selkirk in R v Dunphy reported at 2012 OJ No. 3432.

I have certainly read them, and view Kitchener as distinguishable from the present case. In Kitchener there was an outright unequivocal verbal refusal to comply on more than one occasion at the outset, and then after her arrest Ms. Kitchener then indicated that she would comply but the officer told her it was too late. In my view that is the basis upon which Justice DiTomaso upheld the trial judge in Kitchener, although there is certainly a discussion about mens rea and the mention of both Gutierrez and Porter. Ms. Dunphy was charged with both impaired and refusing an ASD sample. Numerous issues were raised and discussed including those of a Charted nature. Justice Selkirk convicted her on both charges he found her to lack credibility and to be generally unreliable. He framed the issue on the refusal count in paragraph 2 as "Was the refusal or failures willful and intentional and established so beyond a reasonable doubt?" he found that they were and at paragraph 69 he simply says: "I apply the test in R v Porter." He makes no mention of Gutierrez and certainly no discussion of it.

Despite this lengthy discussion with respect to the law involved and the elements of this offence I am of the view that this like most other cases is essentially fact driven when all is considered. I have, of course, as required, considered the evidence as a while in light of the above-mentioned principles. Having done so I found that the evidence of Mr. Euesden was given in a forthright and unembellished manner, and there is certainly and air of reality to the circumstances that he described.

Both officers agreed as well that he was cooperative and forthright. He indicated right away that he had consumed alcohol. He acknowledged understanding the demand and indicated that he would comply. He said he had no health issues and does not seek to show a reasonable excuse, but when it comes down to it he was firm in his position as stated in his Examination-in-Chief "No one said to do anything different than what I was doing. I blew a long time and I can't recall any discussion as to what was being done improperly." In cross-examination he expressed it as " I was never told I was blowing outside my mouth and was just being told to provide another sample." While he acknowledged that he never asked what he was doing wrong he said "I had no idea I was doing something wrong."

For the most part I accept the evidence of Mr. Euesden and I certainty don't reject it. He is a 65-year-old professional man with no previous record. He described this an off-guard experience, being something that he had never had to do before, and he agreed in cross-examination that he paid attention to the instructions.

From my analysis of the evidence in this case I have significant concern about what those instructions were and the observations of the officers as to how they were followed. Both Officer Denaj and Officer Breedon struggled, in my view, to describe what was actually occurring as Mr. Euesden was being tested. Their notes were not of much help either, and as I indicated earlier Officer Denaj for the most part spoke in generalities as opposed to specifics. This might in part be explained by it being early in their careers as police officers. I am far from satisfied that Officer Denaj explained how to properly do what was required. He spoke of "I would have explained or I probably explained" but he didn't demonstrate what was required before Euesden started his samples, and he doesn't seem to know how many were done before or how many after he did the demonstration. Officer Denaj, in fairness, was quite frank about his lack of training on the use of the device and said "To best of his instruction he was told about it, but had no specific course or training on it and had never reviewed the manual and did not know what error messages might

be provided by it." I specifically find that Mr. Euesden was not told by Officer Denaj to make a seal on the mouthpiece with his lips and that the mouthpieces were never examined for any possible obstructions in them.

While Officer Denaj was in charge of this event Officer Breedon was nearby as the efforts were made with respect to the testing. His police experience is of the same duration as Officer Denaj's. He testified he saw Officer Denja proceed to use it in "the usual way" but again cannot provide any specifics. Unlike Denaj Breedon said that he could at times hear the machine making a tone as Mr. Euesden blew into it. I find that Mr. Euesden was not impaired and as well that he was not faking or feigning his attempts, but rather was genuinely trying to provide a sample by following the minimal instructions that he was given.