IN THE DISTRICT COURT
AT AUCKLAND

CRI-2015-004-006542
[2016] NZDC 3801

NEW ZEALAND POLICE
Prosecutor

v

JOSY MOANA KIRTON
Defendant

Hearing: 2 March 2016

Appearances: Sergeant Osborne for the Prosecution
N Satjipanon for the Defendant

Judgment: 4 March 2016

DECISION OF JUDGE D J SHARP

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[1] Josy Kirton faces a charge of driving a motor vehicle on a road while under the influence of drink or a drug or both to such extent as to be incapable of having proper control of the vehicle having on at least two previous occasions been convicted of an offence against the excess blood and breath provisions of the Land Transport Act.

[2] There was prior to the defended fixture submissions filed by both the defendant and prosecution with regard to the admissibility of the blood sample obtained.

[3] The competing submissions in writing have been received and were considered by me at the commencement of the hearing. I informed Mr Satjipanon that the authority referred to by the prosecution namely *McMullen v Police* High

Court Hamilton CRI 2011-419-000076, 5 October 2012 Venning J established that the steps required in order to establish the charge were as follows:

> "*So the drug driving regime encompasses three distinct steps. First, an enforcement officer must have good cause to suspect use of a drug by driver. Secondly a suitably trained enforcement officer must be satisfied the person has either not completed at all or not completed satisfactorily the compulsory impairment test. Finally the result of required blood test must disclose presence of a specified drug or drugs" (paragraph 17)*

[4] The pre-trial ruling was that the elements required for proof in this matter were those expressed in the High Court as being required, in particular that the satisfactory performance of the compulsory impairment test is a matter which is to be determined by the enforcement officer.

Issues

(i) Did Constable Wallace have a basis for reasonable cause to suspect consumption of drugs?

(ii) In Constable Wallace's written check list did she record the results of the compulsory impairment test conclusion in favour of the defendant?

[5] Constable Wallace gave evidence of her experience as in Enforcement Officer. She had been a police officer for 10 years with 7 years experience in relation to transport enforcement matters. She said she was trained to carry out the impairment tests.

[6] On 16 May she was attending a roadside check point at approximately 5.40am. Traffic was light. She observed a black Mercedes vehicle approaching the check point. Her observation was that the vehicle approached at speed and had a near miss with a patrol car parked on the corner of Canada Street and Karangahape Road. She followed the vehicle and stopped it in Hopetown Street.

[7] She spoke to the driver. She said that she could smell alcohol but the driver said she had not had alcohol. The officer advised the driver she wanted to conduct a breath screening test. She suggested to the driver that she do the test outside the vehicle as there was a passenger in the vehicle and this passenger may have been producing alcohol fumes. The officer noticed doing the roadside test that the defendant's eyelids appeared droopy, her eye's bloodshot and that she had stumbled slightly getting out of the vehicle. The officer summarised the basis for her to suspect drug impairment as being the manner of the driving, the droopy eyelids, bloodshot eyes and the slight stumble on leaving the vehicle.

[8] No issue has been raised concerning the New Zealand Bill of Rights. The officer maintained that she had provided such rights and that Ms Kirton had agreed to accompany her to the booze bus in Canada Street. Constable Wallace said she had asked Ms Kirton if she had any drugs in the last 12 hours. Ms Kirton had said no. Ms Kirton later said that over the last 24 hours she had had cannabis. Constable Wallace required a compulsory impairment test. Constable Wallace described the three stages to the test – the eye test, walk and turn assessment and the one leg assessment. The Constable referred at all times to notes produced at the time. These notes recorded an admitted consumption of wine, medication and nurofen also that the defendant had stated that she had had cannabis within the last 48 hours but not the last 12 hours.

[9] The officer has circled that she found good cause to suspect the driver had consumed a drug. The check list has been signed in a number of places by the defendant who indicated that she did not wish to speak to a lawyer. The defendant is recorded at 06:07 as to agreeing to undergo a compulsory impairment test. Constable has recorded conduct of the eye test. She has recorded the walk and turn assessment. She has noted an inability to follow direction by making an incorrect turn and the officer recorded slight stumbles at points within the walk and turn assessment.

[10] Constable Wallace further recorded the one leg assessment. She has recorded sways, use of arms to balance, and hops with regard to the left leg raised and she has recorded no as the answer to the portion entitled ability to follow direction. She

circled the left foot in the air as an area in which she recorded less than desired compliance. At 6:18 she has recorded the compulsory impairment test was completed and in a satisfactory manner to a trained officer. She has further requested Ms Kirton to provide blood at 6:21.

[11] Blood specimen medical certificate has been produced as has an analysis samples found to contain methamphetamine a class A drug and cannabis Tetrahydrocannabinol (THC). No issue has been taken in respect of the taking of the blood sample or of the analysis.

[12] The defence case is that owing to the late hour the use by the Constable of drooping eye lids, blood shot eyes were not a proper basis for a reasonable cause to suspect and that it is likely tiredness of any person encountered at that hour of the morning would provide the same results. Secondly that the officer had no independent means of measuring speed such as a radar device or tracking the vehicle in another vehicle using the speedometer meaning that her suggestion of speed was not supported. Further that the defendant had not stumbled when she alighted from the vehicle and that there was effectively no basis upon which reasonable cause to suspect could have been found.

[13] The second defence point was that by indicating on the form the compulsory impairment test had been completed in a manner satisfactory to a trained officer and circling yes at that provision of the form; that this was an indication that at the appropriate time the subjective view of the officer was that the test had been completed satisfactorily and accordingly the basis to require a blood test was not present.

Law

[14] The test for good cause to suspect I set out by the Court of Appeal in *Police v Anderton:*[1]

[1] *Police v Anderton* [1972] NZLR 233 at 242-243 North P.

"In principle, I can see no reason at all why a Court should require anything more than the ordinary standard of proof in judging the evidence of the traffic officer that the object of facts observed by him justified him requiring the driver to submit to a breath test. All that is required, in my opinion, are circumstances showing that the traffic officer had reasonable grounds for suspecting that the person he was interviewing was worse for liquor. Common sense requires that in judging that from his physical senses alone, the officer is entitled where influence by the conduct of the suspect and in the particular way he has observed him to drive. The test of course is an objective one, but I do not for a moment accept the view that the evidence must reach a "high standard" of proof".

As to what constitutes a suspicion, Neazor J stated in *R v Thompson*[2]*:"The requirement of good cause to suspect, which is the criterion of arrest under s 315(2)(b) of the Crimes Act, is not the same as "reasonable ground for believing"* which is the criteria for the issue of a search warrant under s 198 of the Summary Proceedings Act 1957. The two standards are different and caused to suspect is the lower of the two – *Seven Seas Publishing v Sullivan* [1968] NZLR 663, *R v Grace* [1989] 1 NZLR 197 (CA) and *R v Sanders* [1994] 3 NZLR 450 (CA). In the first case McGregor J referred to the definitions of both words: *"to suspect" is to imagine something evil or undesirable, or on slight or no evidence to imagine or fancy something wrong, to imagine or fancy something to be possible or likely. To imagine something, especially something evil, is possible". "To believe" is to have evidence or faith and consequently to rely upon, to give credence to, to believe in its existing or occurrence.*

[15] In this case the evidence which supported Constable Wallace's "good cause to suspect" were;

(a) Constable Wallace's impression of the speed of the vehicle and her impression that the vehicle had a near collision with a parked patrol vehicle;

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[2] *R v Thompson* (1995) 13 CRNZ 546 (HC) at 12-13

(b) Ms Kirton appearing to have drooping eyelids and blood shot eyes;

(c) Ms Kirton appearing to stumble slightly on getting out of the vehicle;

(d) Ms Kirton's admission that she had in the previous 24 hour but not the previous 12 hours consumed cannabis.

[16] The defence suggestion that Ms Kirton had not stumbled was rejected by Constable Wallace and I accept her evidence in this respect. The defence suggestion of the early hour in the morning being a basis for drooping eyelids and bloodshot eyes is a matter that Constable Wallace conceded could have been a basis for those presentations, however the combination of items together with the admission of having consumed cannabis take me to a point where I am satisfied there was good cause to suspect that Ms Kirton was under the influence of a drug.

[17] The second head of defence relied upon is on the correct interpretation that should be placed upon the officers circling the form used as indicating that the compulsory impairment test was completed in a satisfactory manner to a trained officer. Constable Wallace explained she was satisfied that the test had been completed. She did not take the view that the test had been passed by Ms Kirton. The form records a number of areas of performance that support the officers view as to her reason for both circling the completion of the test, in relation to each facet of the three stage test she has recorded completion. It does, however, also seem that every item that was required was not successfully carried out. The officer has recorded details of the defendant's performance and it appears that the standard included failures. I accept the officer's testimony on this point and can see how the recorded performance is consistent with the officer's explanation. Accordingly I find that the basis for the requirement to provide a blood sample was properly made.

[18] Accordingly all elements of the charge are proven to the required standard.

D J Sharp
District Court Judge