

Status:  Mixed or Mildly Negative Judicial Treatment

***177 Wade v Director Of Public Prosecutions**

Queen's Bench Division

6 February 1995

[1996] R.T.R. 177

McCowan LJ and Dyson J

6 February 1995

Blood specimen—Analysis evidence—Admissibility—Breath analysis device unavailable at police station—Medical reasons for not providing blood—Motorist's statement about preferring to give blood—Further statement by motorist about taking tablets—No evidence of police officer considering statement about taking tablets to be medical reason why blood could not or should not be taken—Police officer asking for blood to be provided by motorist to doctor—Whether compliance with statutory requirements—Whether analysis evidence admissible— Road Traffic Act 1988 ss 5(1)(a), 6(1)(5)(a), 7(1)(2)(3)(b) (4) — Road Traffic Act 1991 s 48, Sch 4 para 42

Section 5(1) of the Road Traffic Act 1988 provides:

'If a person – (a) drives ... a motor vehicle on a road ... after consuming so much alcohol that the proportion in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.'

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Section 6 provides:

'(1) Where a constable in uniform has reasonable cause to suspect – (a) that a person driving ... a motor vehicle on a road ... has alcohol in his body ... he may ... require him to provide a specimen of breath for a breath test ...
(5) A constable may arrest a person without warrant if – (a) as a result of a breath test he has reasonable cause to suspect that the proportion of alcohol in that person's breath ... exceeds the prescribed limit ...'

Section 7 [*as amended by section 48 of, and paragraph 42 in Schedule 4 to the Road Traffic Act 1991*] provides:

'(1) In the course of an investigation into whether a person has committed an offence under section ... 5 of this Act a constable may, subject to the following provisions of this section ... require him – (a) to provide two

specimens of breath for analysis by means of a device of a type approved by the Secretary of State, or (b) to provide a specimen of blood or urine for a laboratory test. (2) A requirement under this section to provide specimens of breath can only be made at a police station. (3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station ... and it cannot be made at a police station unless ... (b) at the time the requirement is made a ... reliable device of the type mentioned in subsection (1)(a) above is not available at the police station ... (4) If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine shall be decided by the constable making the requirement, but if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine.'

The defendant, who was driving a motor vehicle on a road, was stopped by a constable and, in accordance with section 6(1) of the Road Traffic Act 1988, was required to provide a specimen of breath for a breath test which proved positive. He was arrested in accordance with section 6(5)(a) and taken to a police station where a sergeant explained to him that no reliable breath analysis device was available and the consequent procedures to be carried out. In accordance with section 7(3) the defendant was required to provide a specimen either of blood to be taken by a doctor or of urine for laboratory analysis. The defendant was informed by the sergeant that it was for him to decide which specimen it should be, and the sergeant asked the defendant whether he had any representations to make as to which specimen should be taken. He replied that he would prefer blood and the sergeant asked whether there were any reasons why a specimen of blood could not or should not be taken, to which the defendant replied 'I do take tablets,' whereupon the sergeant asked if the defendant would supply a specimen of blood and he agreed. Later a doctor attended and with the defendant's consent took a blood sample from him; analysis showed that it contained not less than 96 milligrammes of alcohol in 100 millilitres of blood. The defendant was charged with driving in contravention of section 5(1)(a) of the Act of 1988. He submitted that, in view of his statement about taking tablets and the sergeant's failure to require urine or inform the doctor of the statement and to allow the doctor to decide whether the specimen should be blood or urine, the evidence relating to the blood test was inadmissible for failure to comply with section 7(4). The justices were of opinion that the defendant's statement about taking tablets was not a reason why a specimen of blood could not or should not be taken, were satisfied that the correct procedure under section 7 had been carried out and ruled that the analysis evidence was admissible. The defendant, who did not give evidence, was convicted.

On appeal against conviction:

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Held, allowing the appeal, that the fact that a person might prefer to give blood was not relevant to the question whether there was a medical reason why he should not or could not give it (p 181L); that, for the appeal to be successfully resisted, the prosecutor had to establish that the defendant's statement about taking tablets was incapable of amounting to a medical reason (p 182J); that, in the absence of evidence before the justices that the sergeant took into account, or gave consideration to whether, the defendant's statement about taking tablets should be treated as a medical reason (p 182K), the justices erred in holding that he had performed the correct procedure laid down in section 7 of the Road Traffic Act of 1988 (p 183A-B); and that, accordingly, the conviction would be quashed (p 183F).

Johnson v West Yorkshire Metropolitan Police [1986] RTR 167, DC and Reg. v Epping Justices, Ex parte Quay [1993] Crim LR 970, DC applied .

Per curiam If the sergeant had concluded that there was no medical reason, he could have requested blood, otherwise, if he was left in a state of doubt, he should have taken the view of a doctor (p 183D-E).

Additional case cited in argument:

Davies v Director of Public Prosecutions [1989] RTR 391, DC .

Case stated by Cumbria Justices sitting at Keswick

1 On 20 July 1993, the defendant, Malcolm Lindsay Wade was charged on an information preferred on behalf of the prosecutor, the Director of Public Prosecutions, that on 19 June 1993 at Keswick the defendant drove a motor vehicle on a road or public place having consumed alcohol in such quantity that the proportion thereof in his blood exceeded the prescribed limit, contrary to section 5(1) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988 .

2 The justices heard the information on 4 March 1994 and found the following facts, none of which were disputed. (a) On 19 June 1993 Police Constable Slattery was on uniformed mobile patrol in a marked police vehicle when he stopped the defendant for a routine document check. (b) At 12.25 am he spoke to the defendant and smelt intoxicants on his breath. (c) A breath test was requested and complied with, the result being positive. The defendant was arrested and taken to Keswick police

station where he was dealt with by Police Sergeant McMonies. (e) Sergeant McMonies explained to the defendant that no reliable breath test device was available at Keswick and the procedures that would be carried out. A further positive screening test was provided. (f) Sergeant McMonies then contemporaneously completed forms T54 and T54(A) in relation to the defendant, the relevant sections for this case being as follows: '3 Requirement-laboratory' specimen because machine not available/drugs suspected/or medical reason. I said to the accused "I now require you to supply a specimen for laboratory analysis. It will be either a specimen of blood to be taken by a doctor, or urine. In either case part of that specimen will be offered to you in a suitable container. The part of the specimen retained by me will be sent for laboratory analysis and a copy of the analyst's report will be given to you. I must warn you that failure to supply such a specimen will make you liable to prosecution, possible disqualification, fine and imprisonment. It is for me to decide which of these it shall be. Have you any representations to make as to which specimen should be taken?" He replied "I would prefer blood." I said "Are there any reasons why a specimen of blood cannot or should not be taken?" He replied "I do take tablets." If the suspect has no reasons why a specimen of blood cannot or should not be taken I said "Will you supply a specimen of blood?" He replied "Yes." If yes, proceed to 5, if no, proceed to 9. If the suspect claims to have reasons why a specimen of blood cannot or ***180** should not be taken either:- (a) require urine at 6, or (b) if blood specimen declined for medical reasons proceed to 4.' (g) At 1.10 a m Dr Ostle attended and with the defendant's consent a sample of blood was taken from his left arm. (h) Forensic analysis showed the blood to contain not less than 96 milligrammes of alcohol in 100 millilitres of blood.

3 It was contended by the defendant that the form T54 and T54(A) had not been properly complied with and that the evidence relating to the blood sample was therefore inadmissible. Having properly asked the defendant if there were any reasons why a specimen of blood cannot or should not be taken the sergeant received the reply 'I do take tablets.' This was clearly a medical reason and therefore the sergeant should have either required urine from the defendant or informed the doctor of the reason and allowed the doctor to decide in accordance with section 7(4) of the Road Traffic Act 1988 whether the specimen should be blood or urine.

4 It was contended by the prosecutor that the reply 'I do take tablets' had not been put forward as a medical reason why blood should not be taken. It was more said for information, the defendant having previously stated a preference for blood. The defendant did not explain or take any further the reply 'I do take tablets.'

5 The justices were referred to the following cases:

Director of Public Prosecutions v Warren [1993] RTR 58, HL(E)

Edge v Director of Public Prosecutions [1993] RTR 146, DC

Director of Public Prosecutions v Nesbitt sub nom Ogburn v Director of Public Prosecutions [1994] RTR 241, DC

6 The justices were of the opinion that the fact that the defendant replied 'I do take tablets' was not a reason why a specimen of blood could not or should not be taken. The defendant had previously indicated he would prefer to give a specimen of blood and when asked 'Will you supply a specimen of blood' replied 'Yes.' The justices were therefore satisfied that the correct procedure as laid down by section 7 of the Road Traffic Act 1988 had been carried out and ruled the evidence of the blood sample admissible.

7 No evidence was then called for the defence, upon which the defendant was convicted and sentenced as follows: fined £200 licence endorsed; disqualified for holding or obtaining a licence for three years under section 34(1) of the Road Traffic Offenders Act 1988 ; costs £160 to the Crown Prosecution Service.

The defendant appealed.

The questions for the opinion of the court were: (1) whether Sergeant McMonies should have required urine having heard the defendant's reasons why a specimen of blood could not or should not be taken; (2) whether there was any evidence to show that Sergeant McMonies made an informed decision when he demanded blood; (3) whether the justices were right to hold that Sergeant McMonies had performed the correct procedure laid down in section 7 of the Road Traffic Act 1988 .

Representation

Julian Smith for the defendant.
Bruce McIntyre for the prosecutor.

JUDGMENT

MCCOWAN LJ

This is an appeal by way of case stated by Cumbria Justices sitting at Keswick.

It appears from the case stated that the information in question was preferred by the prosecutor against the defendant that he on 19 June 1993 at Keswick drove a

motor vehicle on a road or public place having consumed alcohol in such quantity that the proportion thereof in his blood exceeded the prescribed limit.

The information was heard by the justices on 4 March 1994, and they found the following facts in so far as they are relevant. On 19 June 1993 a ***181** police constable stopped the defendant for a routine document check. He then smelt intoxicants on the defendant's breath and requested a breath test of him, which he complied with, the result being positive. The constable, therefore, arrested the defendant and took him to Keswick police station. There a sergeant explained to the defendant that no reliable breath testing device was available, and further explained to him the procedures that consequently would be carried out. He said to the defendant:

'I now require you to supply a specimen for laboratory analysis. It will be either a specimen of blood to be taken by a doctor, or urine.'

After some further remarks, which are not relevant, the sergeant went on:

'It is for me to decide which of these it shall be. Have you any representations to make as to which specimen should be taken?'

The defendant replied:

'I would prefer blood.'

The sergeant then asked:

'Are there any reasons why a specimen of blood cannot or should not be taken?'

The reply was:

'I do take tablets.'

The sergeant then apparently asked him:

'Will you supply a specimen of blood?'

To which he replied:

'Yes.'

Later in the morning a doctor attended and with the defendant's consent took a sample of blood from him. Analysis showed that the blood contained not less than 96

milligrammes of alcohol in 100 millilitres of blood.

It was contended before the justices by the defendant that the form T54 and T54(A) had not been properly complied with and that the evidence relating to the blood sample was, therefore, inadmissible.

It was further submitted that the sergeant having received the reply, 'I do take tablets,' this was clearly a medical reason and consequently the sergeant should have either required urine from the defendant or informed the doctor of the reason and have allowed the doctor to decide, in accordance with section 7(4) of the Road Traffic Act 1988, whether the specimen should be blood or urine.

For the prosecutor it was contended before the justices that the reply 'I do take tablets,' had not been put forward as a medical reason why blood should not be taken. It was more said for information, the defendant having previously stated a preference for blood.

In paragraph 6 of the case the justices state:

'The justices were of the opinion that the fact that the defendant replied "I do take tablets" was not a reason why a specimen of blood could not or should not be taken. The defendant had previously indicated he would prefer to give a specimen of blood and when asked "Will you supply a specimen of blood" replied "Yes". The justices were therefore satisfied that the correct procedure as laid down by section 7 of the Road Traffic Act 1988 had been carried out and ruled the evidence of the blood sample admissible.'

They conclude by stating these questions for the opinion of the court:

(1) whether Sergeant McMonies should have required urine having heard the defendant's reasons why a specimen of blood could not or should not be taken; (2) whether there was any evidence to show that Sergeant McMonies made an informed decision when he demanded blood; (3) whether the justices were right to hold that Sergeant McMonies had performed the correct procedure laid down in section 7 of the Road Traffic Act 1988.'

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In considering those questions I look first at section 7(4) of the Road Traffic Act 1988 :

'If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine shall be decided by the constable

making the requirement, but if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine.'

We were referred in argument to *Johnson v West Yorkshire Metropolitan Police* [1986] RTR 167. The defendant in that case gave as a reason for not giving blood: 'I don't like needles.' In giving the first judgment of the Divisional Court in that case Mustill LJ remarked that the officer in that case believed that the defendant had declined to provide a specimen of blood not because of any medical reason; he continued, at p175F-H:

'The police officer cannot have the power to rule upon a medical issue, but he must have the power to form a view on whether such an issue has been raised at all, for otherwise the medical practitioner would be troubled by excuses which have nothing to do with the expertise which is the reason for his being given a part to play under section 8(4). Applying this interpretation to the present case, one finds that the police officer, faced with a claim for medical immunity which was capable in principle of being valid, usurped the functions of the medical practitioner in holding that it was not valid, and his act was therefore outside the scope of his duties notwithstanding that it was performed in good faith and in a manner which was reasonable when judged by the standards to be expected of a police constable.'

That authority was followed in *Reg. v Epping Justices, Ex parte Quay* [1993] Crim LR 970. In that case also the defendant had told the sergeant that he did not want to give blood because he was afraid of needles and would provide a specimen of urine instead. The Divisional Court, presided over by Evans LJ, held:

'... the applicant had given what was capable of being a medical reason. If the Court assumed the application was correct and that he had told the sergeant he was afraid of needles, then the Court was bound by the decision in *Johnson v West Yorkshire Metropolitan Police* that his fear was capable of amounting to a medical reason. This did not necessarily mean that a doctor had to be called however. The applicant had not given a reason for his fear. If the sergeant had asked him his reasons, then it might have been established that the fear was unfounded ...'

As I have indicated, in paragraph 6 of the case the justices stated:

'The defendant had previously indicated he would prefer to give a specimen of blood and when asked "Will you supply a specimen of blood?" replied "Yes".'

To make sense of this, it would seem to indicate that the justices thought that the fact that he had said he preferred to give blood contradicted any suggestion of a medical reason. In my judgment that cannot be right. The fact that a man may prefer to give blood is not relevant to the question whether there is a medical reason why he should not or could not give it.

That is accepted by Mr McIntyre, appearing for the prosecutor. He has realistically accepted that, for the prosecutor to succeed in resisting this appeal, he has to establish that the reply 'I do take tablets' is not capable of amounting to a medical reason. He submits that he can distinguish the present case from the two authorities to which I have referred.

For my part, I am not persuaded by him that he can distinguish this case. The officer has to ask, 'Are there any reasons why a specimen of blood cannot or should not be taken?' The answer was, 'I do take tablets.' Why should this have been mentioned at all by the defendant, other than as a ***183** possible reason why a specimen of blood could not or should not be taken? In my judgment, it must be taken as a representation as to which specimen should be taken, albeit the defendant was also saying that he would have personally preferred to give blood. It was for the officer to decide whether a specimen of blood or urine should be taken, but it is accepted by the prosecutor in this case that there was no evidence before the justices that he took into account the answer given or gave consideration to whether it should be treated as a medical reason.

Put another way, the officer had, in my judgment, to consider whether the reason proffered was capable of being a medical reason. On the face of it, it was. It could have affected the reading; it could have meant that it was medically unwise for him to give blood at all. Both of these may seem far-fetched, but in the absence of any medical evidence it is impossible to know whether there may not have been substance in those points.

The officer, if he had doubts about it, could have questioned the defendant as to the nature of the tablets and the condition for which he took them. To repeat the example which we cited to counsel: supposing the man had said that they were vitamin tablets; then the officer might well have been justified in thinking that this could not possibly be a medical reason. As it was, he asked, as far as we know, no questions at all. There is no evidence that he gave consideration to the answer at all. If he had concluded that there was no medical reason, he could have required blood, but, otherwise if he was left in a state of doubt about the matter, he should have taken the view of a doctor.

Returning to the questions posed by the justices, it seems that the answer to question (1) is that he should not have required urine without consideration of the answer: 'I do take tablets.' The answers to questions (2) and (3) are both in the negative.

Consequently I, for my part, would allow the appeal and quash the conviction.

DYSON J

I agree.

Reported by Miss Alison Sylvester, Barrister

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Representation

Solicitors for the defendant: Michael Henderson & Co , Washington

Solicitors for the prosecutor: Crown Prosecution Service , Newcastle upon Tyne

Appeal allowed. Justices' questions answered (1) in the affirmative, (2) and (3) in the negative. Defendant's costs of application and below. Legal aid taxation

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