EDITORIAL NOTE: SOME NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED

IN THE DISTRICT COURT
AT WHANGAREI

CRI-2017-088-000006
[2017] NZDC 15166

NEW ZEALAND POLICE
Prosecutor

v

TIMOTHY GRAHAME KING
Defendant(s)

Hearing:	30 June 2017
Appearances:	Sergeant S Wilkes for the Prosecutor A Haskett for the Defendant
Judgment:	18 July 2017

RESERVED JUDGMENT OF JUDGE G L DAVIS

---

[1] Timothy King is charged with driving with excess breath alcohol on 1 January 2017 in the Tutukaka area.

[2] For the purposes of this prosecution it is not contested that:

(a) The police were operating a vehicle checkpoint in the Tutukaka area on New Year's day; and

(b) The evening before he had consumed 6-8 pre-mix Coruba drinks; and

(c) The following morning at about 8:30am the defendant drove to the vehicle checkpoint; and

(d) Upon arrival at the checkpoint, he was required to undertake a roadside breath test; and

(e) Mr King failed the roadside breath test; and

(f) He then was required to undertake a breath screening test which rendered a result 250 micrograms of alcohol per litre of breath or over; and

(g) The defendant was required to accompany [the Constable] to the Whangarei Police Station, a booze bus, or such other place for the purposes of an evidential breath test, blood test or both; and

(h) Mr King was read his rights pursuant to the New Zealand Bill of Rights Act 1990 and asked if her wished to speak with a lawyer as required during the roadside breath test, the breath screening test and the evidential breath test procedures; and

(i) Mr King agreed to accompany the officer and completed the breath screening tests and the evidential breath tests as required; and

(j) He was taken to a police patrol vehicle that had an approved device set up in the back seat to complete the breath screening test and the evidential breath test; and

(k) The defendant underwent an evidential breath test without delay at 8.40 am using a Draegar 9510NZ device; and

(l) The evidential breath test revealed a result of 441 micrograms of alcohol per litre of breath; and

(m) [the Constable] advised the driver of the result of the evidential breath test at 8.42 am; and

(n) The advice of the positive evidential breath test was given without delay in accordance with POL515 Block J5 at 8.44 am; and

(o) The advice was read by [the Constable] verbatim from Block J5 of the POL515 form and included the words, "If you do not within 10 minutes request a blood test the evidential breath testing you have just undergone could, of itself, be conclusive evidence in a prosecution against you under the Land Transport Act 1998."; and

(p) [the Constable] read verbatim the advice in Block J6 of form POL515 to the defendant; and

(q) The defendant signed Block J at 8.44 am; and

(r) The defendant was read the advice prior to the 10 minute period being given in Block K verbatim by [the Constable] and again he circled he did not wish to speak with a lawyer. The defendant signed that form at 8.45 am; and.

(s) The 10 minute period commenced at 8.45 am and concluded at 8.57 am; and

(t) The defendant did not elect to give a blood test; and

(u) The defendant was forbidden to drive for 12 hours.

[3] The two issues that this prosecution raises are:

(a) Whether the 10 minute period that was given by [the Constable] to the defendant to enable him to consider whether he wishes to elect a blood test was given without undue interruption, such that the defendant could properly reflect on whether to request a blood test; and

(b) Secondly, whether the police have complied with s 77(3) and s 77(3A) of the Land Transport Act 1998.

[4] I turn to consider each of these points in turn.

The 10 minute period

[5] Mr King takes the view that a combination of factors viewed individually or collectively means that he did not have 10 minutes after the advice of the positive evidential breath test in which he could properly consider whether a blood test should be requested.

[6] Those factors include:

(a) The foot well of the passenger seat in which Mr King was asked to sit was "full" of used mouth pieces that had previously been fitted to the evidential breath testing device. Those used mouth pieces, Mr King says, had been used by other members of the public and discarded by the police officers in the passenger foot well; and

(b) The police patrol vehicle was too hot to be comfortable for the defendant; and

(c) The defendant could not exit the patrol vehicle; and

(d) There were interruptions to the 10 minute period as a result of chit-chat from [the Constable]; and

(e) There was an interruption by a lady across the road yelling at the police officers; and

(f) There were numerous distractions from members of the public going by and about their morning business; and

(g) There was not a sufficiently private space to enable Mr King to consider his rights.

The foot well

[7] The evidence Mr King gave was that the patrol car's foot well was "full" of used mouth pieces. The used mouthpieces were the mouthpieces that were fitted to the device required to be used for either the purposes of a breath screening test, and evidential breath test, or a combination of each. Mr King's evidence was that there were dozens of "caps" as he described them in the back seat. His evidence was he was disgusted by the mouth pieces being left in the foot well and he considered the environment in which he was asked to complete the breath screening test and to consider whether to give blood to be unhygienic. He said he was wearing only a singlet, board shorts and jandals at the time and he described having to "dig" his way through the used mouth pieces using his jandal clad feet to put his feet on the floor.

[8] In contrast, [the Constable]' evidence in cross-examination was that both foot wells were full. The constable agreed that there had been some mouth pieces that had been used and discarded in the foot well. He did not accept the foot wells were full in the manner described by counsel, nor did he accept there were dozens in the foot well. The constable said that prior to leaving Whangarei to set up the checkpoint in Tutukaka he, and a fellow officer, conducted a pre-shift check of the vehicle. The patrol vehicle was clean and it was roadworthy in his view. The evidence was that Tutukaka is approximately 25 minutes drive from Whangarei City.

[9] I do not accept the proposition put in cross-examination that the foot wells were "full" of used mouth pieces as was asserted in cross-examination. Nor do I accept the evidence that there were dozens of used mouth pieces as the defendant suggested. The checkpoint had been in operation for approximately one hour. There was no evidence led or cross-examined as to how many people had been stopped at the checkpoint and breath tested prior to Mr King coming to the patrol vehicle.

[10] I reject the notion that there were dozens of used mouth pieces, let alone each foot well being full of used mouth pieces. I accept the evidence that it was likely there were some used mouth pieces.

[11] The question becomes whether the individual effect of the some used mouth pieces in the foot well would render the 10 minute period unsafe. Mr King did not raise his concerns with the police officers and the police officers were not aware of any concern that Mr King may have had. The onus is on the police to provide a clean and safe environment for any person who is detained for the purposes of the breath and blood alcohol testing procedures.

[12] Mr King was described as being co-operative throughout the procedures. The evidential breath test procedure had been underway for at least five minutes including the completion of the POL 515 form when there was a general discussion, question and answer discussion. There does not appear from the evidence I heard to have been any barrier to Mr King raising concerns if he had them.

[13] I take the view this would not of its own interfere with the 10 minute period that Mr King had.

The heat of the vehicle

[14] Mr King's evidence was that the temperature in the patrol vehicle was so hot and stifling that that too impacted on his ability to consider the 10 minute period. The stop occurred at about 8.30 in the morning. Mr King was wearing jandals, he was wearing board shorts and a singlet. He described the sun as "streaming into the vehicle".

[15] In contrast, the officer was in full police uniform including a stab-proof vest. He too sat in the car throughout the 10 minute period. He said the engine was running and the air conditioning was set to auto. He thought the air conditioning may have been set to 18 or 19 degrees Celsius. He did not feel any discomfort at that time.

[16] Mr King says the engine was not running and therefore the air conditioning was not on.

[17] I prefer the police officer's evidence on this point. He has no reason to lie. Mr King, in my view, has exaggerated the claim the internal conditions in the vehicle were too hot. Again Mr King did not raise this with the police officers at any point during the evidential breath test and process. He was even able to recall if the air conditioning was on or the vehicle's motor was running.

Mr King was detained and could not exit the vehicle

[18] Mr King's evidence was that he could not exit the police vehicle because the vehicle's child-proof locks were engaged. This ground is tied to the defendant's concerns about the heat of the vehicle and the general conditions that Mr King complains of. This in turn impacted on his ability to consider whether to give blood during the 10 minute period.

[19] The constable's evidence was that the child-proof locks were never engaged. The constable's evidence was that the child-proof locks are not engaged as a matter of course. He acknowledges while he did not check specifically whether the child-proof locks were engaged in the pre-shift vehicle.

[20] Mr King in cross-examination conceded that he did not try to open the door while he was seated in the back of the police vehicle and as a result I find as a matter of fact that the child-proof locks were not engaged. I prefer the evidence of the constable on this point. There would have been no reason for the constable to depart from his normal procedure and engage the child-proof locks.

[21] I take the view that this claim has not of itself interfered with Mr King's 10 minute period.

Interference and chit-chat by [the Constable]

[22] Mr King alleges the ten minute period was interrupted by chit-chat from [the Constable]. This included discussions about going surfing at nearby Sandy Bay. [the

Constable] says that is not the case. There was no such chit chat. The constable said he remained in the patrol vehicle throughout the ten minute period. He was asked in cross-examination whether he got out of the vehicle during the ten minute period. The constable's position was that it was not his practice to get out of the vehicle during the ten minute period. He did not believe he did in this instance. He conceded it may have been possible but unlikely. He acknowledged no independent recollection Mr King's processing procedures other than what was recorded in the POL 515 form. That is an appropriate concession by a witness that in my view strengthens the quality of his evidence.

[23] I do not consider it likely the officer got out of the vehicle. [the Constable] is an experienced officer with no reason to exaggerate this point.

Interference by the intoxicated lady across the road

[24] Mr King's evidence was an intoxicated lady across the road from the checkpoint called out to the police while he was being processed and that interfered with the 10 minute period he was given. The police officer did not recall that happening.

[25] The overall thrust of Mr King's evidence on this point ant the following ground he raises is that he was embarrassed to be detained by the police. He felt that he would be seen by people that he knew, or knew him and this caused him some consternation.

[26] I am of the view that there is a possibility that a person did call out to the police during the processing but given it was not recorded by the police officer, that it would have been relatively minor and I do not form the view that it would have unduly interfered with Mr King's time to contemplate whether to give blood.

Lack of privacy and busyness

[27] Mr King said that his general privacy was interfered with. He was concerned that people coming to and from the nearby Tutukaka shops, and a farmer's market, would have seen him in the patrol vehicle and that he believed it was a place for

criminals. He did not give any evidence as to how many people there were, simply to describe it as busy.

[28] In contrast the police evidence was it was not busy at all. It was 8.30 in the morning of New Year's Day.

[29] I prefer the police officer's evidence on this point. The checkpoint was being conducted in an area where there was likely to be people who had been consuming alcohol and it was important as a general public safety exercise for the police to ensure those who were on the road having consumed alcohol were taken from the road. Mr King fitted into that category. The fact that a police car is used in a remote rural location when there is not otherwise a police station handy or where there is not access to a booze bus or something similar, in my view is simply a reflection of the realities of remote rural policing.

[30] Tutukaka is a well-known tourist hot-stop where New Year's revelry is common place. The practicalities of policing in rural areas must, in my view, be considered. Mr King was placed into the back of the police vehicle to ensure he had time on his own to reflect on whether he wished to give blood. It would have been impractical in my view for him to have been taken to the police station some 25 minutes away, simply for those decisions to have been undertaken.

[31] Mr King says he was placed under pressure by the police and hurried through the 10 minute period. He said the police officers encouraged him not to give blood because they would have to pack the checkpoint up.

[32] I reject that evidence and prefer the evidence of [the Constable]. [the Constable]' evidence was that it made no difference to him whether Mr King elected to give blood or not. If he wished to give blood the checkpoint would have been packed up, they would have gone to Whangarei. Mr King could have given blood and the checkpoint would have been re-established in the Whangarei area. The evidence was the constable's shift had just started and it was no inconvenience to [the Constable] at all to go to Whangarei if that was what was required. The constable

specifically rejected the point that packing up the check point was an inconvenience. I prefer the constable's evidence on that point.

[33] Looking at the concerns raised by Mr King individually and collectively, I take the view the only matter that has any merit is the concern about the used mouth pieces in the foot well. While I have rejected the notion that the foot wells were full of mouth pieces or that there were even dozens there, it is in my view unprofessional for used mouth pieces to be left in the foot wells while other members of the public are required to complete evidential breath tests around them.

[34] While I have made those comments I do not believe that individually or collectively those concerns or any of the others raised are sufficient to form the view as a matter of law that Mr King's will was overborne during the 10 minute period such that he could not give detailed and considered thought to whether he wished to give blood. In my view, those grounds of his argument fail.

Compliance with s 77(3) and s 77(3A)

[35] It is important to elaborate on Mr King's evidence before this ground is considered.

[36] Mr King's evidence was that the bar he was at stopped serving alcohol at 11.00pm. That was not contested. His evidence was that the bar closed at midnight. That too was not contested. His evidence was that he took a taxi home that evening and on his arrival home he had some snacks and drank some water. He did not "feel intoxicated" the next morning. He had breakfast and prepared to go surfing.

[37] He was surprised to be over the breath alcohol limit when he was stopped at the checkpoint.

[38] Mr King's principal argument here is that the advice provided in Block J5 of the POL515 form did not comply with the statutory provision set out at s 77(3A) of the Land Transport Act 1998. The difference Mr King says is that the advice refers to the evidential breath test being conclusive evidence in a prosecution whereas s 77(3A)

says that the evidential breath test will be conclusive evidence to lead to that person's conviction for an offence.

[39] Mr King's evidence was he thought that a prosecution would mean he would be able to explain what had happened the night before and what steps he had taken to ensure he was not over the limit. The thought that a conviction was something more than that.

[40] Mr King claimed he did not know what the legal breath and blood alcohol limits were. He said in evidence that he knew they had changed but did not know what they had changed to.

[41] I find little turns on Mr King's explanation. His evidence that he thought a prosecution would mean he would be able to explain what he had done the night before, and what steps he had taken poses the question "explain to whom?" Clearly that must mean and can only mean, "explain to the court or to someone who could determine whether the prosecution would continue". The notion that one can "explain to the court" also infers a decision as to the reasonableness of that explanation will follow. What flows from that is the explanation may be accepted, but equally it may be rejected.

[42] Mr Haskett says that the fundamental difference in the advice and the legislation is to sheet home to the defendant the importance of the right to give blood. If there are concerns about any aspect of the evidential breath testing procedure or the accuracy of the equipment, then that is cured by a defendant giving blood and that blood being sent for ESR examination. That right, Mr Haskett says, is one that is fundamental.

[43] Mr Haskett says that this is not a case that can be cured by the provisions of s 64(2) of the Land Transport Act which deals with reasonable compliance because he submits there cannot be reasonable compliance when a fundamental right of a defendant has been breached. For the Court to determine that a fundamental breach of a defendant's rights can be cured by reasonable compliance is equivalent to the

Court countenancing a breach of the New Zealand Bill of Rights by the police and allowing the police to re-write the statute. That, he says, is not the law.

[44] As is clear from the Court of Appeal decision, *R v Chadderton*[1], there is a distinction between cases where the issue concerns an alleged breach of the New Zealand Bill of Rights Act and in cases where the issue is an alleged failure to comply with the procedural requirements of the Land Transport Act. The reasonable compliance section of the Land Transport Act can only apply to cases where there has been an alleged failure to comply with the procedural requirements. If it is found that there has not been reasonable compliance that is determinative and the issue is not one of admissibility of evidence; s 30 Evidence Act 2006 is not then engaged.

[45] When there is an allegation that there has been a breach of the New Zealand Bill of Rights Act s 64(2) does not apply and the Court must assess the police conduct against the standards set by the Bill of Rights. If the breach is proven it may render the blood or breath test evidence improperly obtained and if that is so then the Court is required to carry out the s 30 balancing exercise.

[46] I do not support the position adopted by Mr Haskett. Section 77(3A)(a) says, "That the positive test could of itself be conclusive evidence to lead to that person's conviction for an offence." The key words in my view are, "<u>The test could of itself be conclusive</u>." A conviction can only be obtained once a prosecution is commenced. A conviction cannot be obtained without a prosecution commencing. The purpose behind the words, "Could of itself be conclusive evidence," in a prosecution signals to the defendant that a positive evidential breath test could lead to a prosecution being commenced. It is in my view clear and unambiguous.

[47] Once a prosecution is commenced it will be a matter for the court, having heard the evidence and considered the law whether a prosecution is successful and a conviction will be entered.

---

[1] *R v Chadderton* [2014] NZCA 528

[48] I agree with His Honour Judge Harding in *Police v Munford*[2] that the words in the procedure sheet, that the form of the document is less than ideal. As Mr Haskett properly conceded the police officer on duty on 1 January was acting in good faith in reading Block J5 verbatim. There is nothing sinister in the change of the form that I can see. The officer could not explain why the form had been changed from previous iterations in which the exact wording in s 77(3A) had been adopted, but nor would one expect the officer to be able to explain the change in the wording. He was not privy to the drafting of the form.

[49] I am satisfied that Mr King fully understood his rights. He was read his Bill of Rights cautions on three occasions. He refused to speak with a lawyer. He was given a 10 minute period and the right again to speak with a lawyer was conveyed to him. He chose not to do that. Those are positive choices that he has made. He could, if he had wished to do so, elect to give blood and any concerns about the accuracy of the reading or his surprise at being over the limit could have been remedied immediately. The Supreme Court expressed the social significance of drink driving in *Aylwyn v R*[3] thus:

> [17] Every driver of a motor vehicle on the roads of this country should by now be aware that driving after consuming more than a small amount of alcohol is dangerous, illegal and socially unacceptable. The great majority of drivers comply with their obligations in this respect. A small minority do not. Parliament has legislated to ensure that these drivers do not escape responsibility through technical and unmeritorious defences. The Courts must give full effect to that clear parliamentary indication.

[50] One has to bear in mind that Mr King consumed six to eight pre-mixed drinks and finished drinking at about 11 o'clock at night. He knew he was intoxicated because upon his return home he drank water and ate food to try and reduce his level of intoxication. He said he did so again the following morning. Those are all signals that he knew that because he had been consuming alcohol the night before he may have still been over the legal breath alcohol limits. He was surprised that he was over the limit, but that in my view does not lessen the obligations that remained on Mr King not to drink and drive and to ensure that he did not drive while being over the legal alcohol limit. This court hears all too regularly expressions of surprise from

---

[2] *Police v Munford* [2016] NZDC 13408
[3] *Aylwyn v R* [2009] 2 NZLR 1 @ 17

defendants about being over the legal breath or blood alcohol limit despite having consumed alcohol some hours beforehand.

[51] I am of the view that the prosecution must succeed. I am satisfied that all of the ingredients of the offence have been proved to a standard beyond a reasonable doubt. I reject in their entirety the defences raised by Mr King. A conviction will be entered and Mr King is to appear in the Whangarei District Court on 24 July 2017 for sentence.

[52] I signaled at the conclusion of the hearing that if this matter went in Mr King's favour he would not need to appear, but equally if a conviction were to follow a fine of $440 plus Court costs and the mandatory minimum disqualification of six months would be imposed. That position was agreed by the police. Given that I understand Mr King has instructed counsel privately, he will not need to have counsel available if the sentence that I have indicated in this judgment (including the mandatory minimum disqualification from holding or obtaining a driver's licence) is to be imposed. If there are to be any alternate applications, Mr King will need to have counsel attend on 24 July.

G L Davis
District Court Judge