

Alberta Transportation Safety Board

Citation: 2018 ABTSB 1119

Date: 2018-08-09

AALSN

IN THE MATTER OF THE *Traffic Safety Act* (the “Act”);

AND IN THE MATTER OF an Administrative Licence Suspension Appeal to the Alberta Transportation Safety Board (the “Board”) lodged by J. Fedoruk (the “Appellant”);

A written hearing was held in the City of Edmonton, in the Province of Alberta, on August 9, 2018.

BEFORE:

D. Poon Phillips, Presiding Officer

W. Haas, Member

P.E. Maeda, Member

PRESENT:

B. Marshall, Board Secretary

P. Hale, Independent Counsel to the Board

J. Arendt (Student-at-Law), Independent Counsel to the Board

BACKGROUND / PRELIMINARY MATTERS

Notice of the hearing and the police disclosure were provided to the Appellant by email dated June 4, 2018, and to the Registrar of Motor Vehicle Services (the “Registrar”), in advance of the hearing.

EVIDENCE AND DOCUMENTS CONSIDERED

The Board considered the documents listed in Appendix “A”, which were provided in advance of the hearing.

SUBJECT MATTER OF THE APPEAL

1. The subject matter of the appeal is a licence suspension issued to the Appellant under the *Act*. The Notice of Suspension shows that the Appellant was issued an Alberta Administrative Licence Suspension (“AALS”) under section 88.1 of the *Act* because the Appellant drove a motor vehicle while impaired by alcohol, drug, or a combination of alcohol and drug contrary to sections 253(1)(a), 255(2), and (3) of the *Criminal Code* (Canada).

2. The Appellant has appealed the AALS.
3. The Appellant provided the following reason for the appeal:
 - a. There is insufficient evidence that the Appellant's ability to operate a motor vehicle was impaired, as the only evidence noted in the police disclosure is unsteady balance and the officers did not take any further investigative steps which are commonly done in impaired investigations.

ROLE OF THE BOARD

4. The role of the Board under section 39.2 of the *Act* is to determine whether to confirm or cancel an AALS. The basis upon which the Board must make this determination is set out in sections 39.2(5) and (6) of the *Act*, which provide in part:

39.2(5) if, after conducting an appeal under this section, the Board is satisfied that

- (a) the person drove a motor vehicle having consumed a drug, alcohol or a combination of a drug and alcohol in such a quantity that the person's ability to operate the motor vehicle was impaired at any time within 3 hours after having driven a motor vehicle,
- (b) ...
- (c) ...

the Board must confirm the suspension or disqualification.

39.2(6) If, after conducting an appeal under this section, the Board is satisfied

- (a) that the person did not drive a motor vehicle having consumed a drug, alcohol or a combination of a drug and alcohol in such a quantity that the person's ability to operate the motor vehicle was impaired at any time within 3 hours after having driven a motor vehicle,
- (b) ...
- (c) ...

the Board must cancel the suspension or disqualification and direct the return to that person of any fees paid to the Government by that person in respect of the appeal conducted under this section.

POLICE DISCLOSURE

5. On May 1, 2018, at 2315 hours, Cst. Deschenes-Lafond and Cst. Doiron of the Airdrie RCMP were patrolling in a construction site area where multiple complaints of people parking to sell or do drugs had been made. The officers observed a parked dark colour vehicle with two males sitting in it.
6. Cst. Deschenes-Lafond walked towards the driver's side of the vehicle. While walking up to the vehicle, Cst. Deschenes-Lafond noted a strong odour of marijuana coming from the vehicle and that the vehicle was turned off. While speaking with the driver (the Appellant), Cst. Doiron informed Cst. Deschenes-Lafond that he could see a bong with fresh marijuana in it sitting on the floor in the back of the vehicle. Cst. Doiron and Cst. Deschenes-Lafond placed both the Appellant and his passenger under arrest for possession of a controlled substance, asked them to step out of the vehicle, and took them to the police vehicle.
7. Cst. Doiron searched the Appellant and while searching him, Cst. Deschenes-Lafond noted that the Appellant was having a hard time keeping his balance and that the Appellant had red and glossy eyes. Cst. Doiron noted that the Appellant had difficulty standing, he had a strong odour of marijuana coming from his breath and his eyes were bloodshot. Cst. Deschenes-Lafond informed the Appellant that he was also under arrest for impaired care or control of a motor vehicle by drug and placed the Appellant in the police vehicle.
8. Cst. Doiron and Cst. Deschenes-Lafond conducted a search of the Appellant's vehicle and found multiple baggies containing marijuana and a glass pipe. The keys were in the ignition of the vehicle and Cst. Deschenes-Lafond turned the key over and the vehicle started. The officers decided that no charges would be laid on the passenger, and he was let go. The Appellant was informed that no charges would be laid in relation to the found marijuana, but the impaired care or control charge would remain.
9. At 2319 hours, Cst. Deschenes-Lafond gave the Appellant the police caution and read him his Charter rights, and the Appellant responded, "Ya" to understanding and "Probably just a free lawyer" to contacting legal counsel. At 2322 hours, Cst. Deschenes-Lafond read the Appellant the caution, and he responded, "Ya" to understanding. The Appellant was asked to destroy the marijuana on scene.
10. At 0001 hours, the Appellant was driven home and released on a Promise to Appear and served with all relevant police documents. As the Appellant wanted to contact Legal Aid, the number was provided to him so he could call on his own time with privacy.

SUMMARY OF THE APPELLANT'S EVIDENCE

11. The Appellant did not provide any testimony or submit any evidence to the Board.

SUMMARY OF ARGUMENTS

Appellant

12. Counsel for the Appellant argued that the Registrar has not established that the Appellant drove a motor vehicle while his ability to do so was impaired by alcohol or a drug. To uphold the Appellant's suspension, the Board must be satisfied that the Appellant's ability to operate a vehicle was impaired; it is not enough that the Appellant was impaired (*R. v. Andrews*, [1996] A.J. No. 8).
13. There is only minimal and equivocal evidence of impaired ability to drive. The indicia of impairment noted by the officers are limited to red and glossy eyes; an odour of marijuana on the breath when close; and unsteady balance while the police were conducting a frisk search. Red and glossy eyes are potentially indicia of consumption but are not indicia of impairment, and the same can be said for the odour of marijuana on the Appellant's breath. As such, these indicia are unable to demonstrate impairment.
14. The only potential indicium of impairment noted by the officers was the Appellant's unsteady balance while being frisked. However, there is no indication the Appellant had any issues with his balance while exiting his personal vehicle; no issues with his balance while being escorted to the police vehicle; no issues with his balance while being secured in the police vehicle; no issues with his balance at the time he was released; and neither officer provided any details relating to how the Appellant's balance was affected while being searched. It cannot be determined if the Appellant had any motor or balance issues, and the Board is simply faced with the officer's summary conclusion.
15. Further, the officers did not require the Appellant to provide samples or comply with the standard field sobriety tests commonly used in impaired by drug investigation and the indicia relied on by the arresting officer are extremely limited. The indicia observed does not even meet the threshold for reasonable and probable grounds to arrest and is insufficient to prove, on a balance of probabilities, that the Appellant's ability to operate a motor vehicle was impaired. The Appellant cites the cases of *R. v. Gonzales*, 2001 ABQB 757 and *R. v. Andrews*, [1996] AJ No. 8.

Registrar

16. Counsel for the Registrar argued that there is evidence that Appellant consumed a drug and that consumption impaired the Appellant's ability to drive (*Oka (Re)*, 2016 ABTSB 664).
17. The Appellant does not appear to dispute that he was in care or control of the vehicle and consumed drugs. Care or control is established on the evidence that the Appellant was in the driver's seat of an operational vehicle in a construction area. The Registrar argued that drug consumption is established by the smell of

burnt marijuana, the bong, fresh marijuana in the vehicle and the smell of marijuana on the Appellant's breath.

18. The Registrar argued that impairment is established by Cst. Deschenes-Lafond's observation that the Appellant "had a hard time with his balance" and Cst. Doiron's observation that the Appellant "had difficulty standing" in combination with the other evidence of intoxication and consumption.

ISSUES BEFORE THE BOARD

19. In the Board's view, the issue in this appeal is whether the Appellant drove a motor vehicle having consumed a drug in such a quantity that his ability to operate the motor vehicle was impaired at any time within three hours after having driven a motor vehicle.

FINDINGS OF THE BOARD

20. The Board finds that the Appellant did not drive a motor vehicle having consumed a drug in such a quantity that his ability to operate the motor vehicle was impaired within three hours of driving.

REASONS OF THE BOARD

Whether the Appellant's Ability to Operate a Motor Vehicle was Impaired by Drugs

21. The Board notes that the Notice of Suspension relates to impaired driving by drugs.
22. In order to uphold the suspension for impaired operation of a motor vehicle, the Board must be satisfied that the Appellant consumed a drug and that the Appellant's ability to drive was impaired.
23. The Board finds that the Appellant consumed marijuana based on the totality of the evidence, including: the smell of marijuana from the Appellant's breath, the odour of burnt marijuana that was noted by the officer in the vehicle, a bong in the back seat, a pipe in the vehicle, fresh marijuana in the vehicle and the Appellant's red, glossy eyes.
24. Having found consumption, the Board went on to consider whether the Appellant's ability to drive was impaired and finds that there is insufficient evidence of impairment.
25. The Board noted the evidence in the officers' handwritten notes and General Report that the Appellant was unsteady on his feet and had a hard time keeping his balance while being searched. However, the officers made no further observations in their reports of any other indicia of impairment such as a driving pattern, coordination deficiencies or cognitive impairment. Further, the officers did

not conduct a field sobriety test or request a Drug Recognition Expert to conduct testing on the Appellant to determine whether the Appellant was impaired. Although the Registrar referred to “other evidence of intoxication”, the Board did not find such evidence in the police disclosure. The Board finds that there is insufficient evidence to find that the Appellant’s ability to drive was impaired.

26. On the evidence before it, the Board is satisfied, on a balance of probabilities, that the Appellant did not drive a motor vehicle having consumed a drug in such a quantity that his ability to operate his motor vehicle was impaired at any time within three hours after having driven a motor vehicle.

CONCLUSION

27. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant’s licence suspension immediately.
28. In addition, under section 39.2(6) of the *Act*, the Board directs the return of any fees paid to the Government by the Appellant in respect of this appeal.

DATED at the City of Edmonton, in the Province of Alberta, this 30th day of August, 2018.

ALBERTA TRANSPORTATION SAFETY BOARD



D. Poon Phillips, Presiding Officer

APPENDIX "A"

DOCUMENTS RECEIVED PRIOR TO THE HEARING AND MADE AVAILABLE AT THE HEARING:

No. ITEM

Application for Hearing

1. Application for Hearing received by the Board May 15, 2018, including Notice of Suspension/Disqualification

Police Disclosure

2. General Report of Cst. Deschenes-Lafond
3. Handwritten Notes of Cst. Deschenes-Lafond
4. Supplementary Occurrence Report of Cst. Doiron
5. Promise to Appear
6. Undertaking Given to a Peace Officer or an Officer in Charge
7. Notice of Suspension/Disqualification
8. Motor Vehicle 24 Hr. suspension/Seizure/Impound Report

Submissions of the Appellant

9. Written Submission from Counsel for the Appellant dated July 18, 2018

Submissions of the Registrar

10. Written Submission from Counsel for the Registrar dated July 24, 2018