

Citation: *R. v. Sidney*, 2021 YKTC 40

Date: 20210909  
Docket: 20-00357  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Chisholm

REGINA

v.

SASHA SIDNEY

Appearances:

Jane Park  
Malcolm E. J. Campbell

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] CHISHOLM T.C.J. (Oral): Sasha Sidney is charged that, without reasonable excuse, she refused to comply with a demand to provide samples of her breath into an approved screening device contrary to s. 320.15(1) of the *Criminal Code* (the “Code”).

[2] Cst. Louis Allain, the investigating officer, testified for the Crown. The defence called no evidence.

**Summary of the Relevant Facts**

[3] Cst. Allain testified that in the early morning hours of June 11, 2020, he received a report of erratic driving on the North Klondike Highway. A description of the vehicle, as well as the licence plate number, were included in the information provided to him.

[4] The officer testified that approximately 15 minutes after receiving this report, he located a vehicle matching the initial description in a rest area just south of the North Klondike Highway and Alaska Highway junction. As he was pulling into the rest area, he noted a woman walking from the rear of the vehicle, who was about to open the driver's side door. Later in his testimony, he clarified that she was walking from the driver's side door to the rear of the vehicle as he approached. The vehicle was running. He observed that the licence plate number was the same as provided in the erratic driving complaint.

[5] The officer exited his vehicle, and in speaking with the woman, whom he identified as the defendant, he noted that a few words of her speech were slurred, and that there was an odour of liquor coming from her breath. As a result, he detained Ms. Sidney for an impaired driving investigation, and asked her to accompany him to the front of the police vehicle. As they approached the front of the police vehicle, Cst. Allain testified that Ms. Sidney pulled away from him and yelled for him not to touch her. She refused two more requests of the officer to move to the front of the vehicle. Responding to her concern that the interaction be recorded, the officer advised her that his dash camera was operating.

[6] Cst. Allain testified that after his third request that she come to the front of the police vehicle, she pulled away, and pushed his arm away. He arrested her for assaulting a police officer, handcuffed her, and placed her in the rear of the police vehicle. The officer checked the minivan for other passengers and located a man in the front passenger seat who advised him that Ms. Sidney was the driver.

[7] The officer returned to the police vehicle, and reacting to Ms. Sidney's discomfort, he adjusted the tightness of the handcuffs on her. From memory, he advised her of the demand for breath samples as he suspected that she had alcohol in her body. According to the officer's testimony, she became belligerent, indicating that she would rather go to the drunk tank.

[8] Next, Cst. Allain testified that he read Ms. Sidney the approved screening device demand from a card he carries. He testified that she responded that she would see him in court, and that she would see that he got kicked out of Whitehorse and punched in the face. She reiterated that she would rather be taken to the drunk tank. The officer advised her that she was also under arrest for uttering threats. When he asked her if she understood the demand, she responded with a profanity, and questioned the officer as to whether he had heard her. She subsequently threatened him further.

[9] Based on Ms. Sidney's behaviour and unresponsiveness to questions, Cst. Allain was of the view that she was refusing to provide samples. When he subsequently read to Ms. Sidney her *Charter* rights, she continued to be belligerent with him.

[10] The officer explained that he had turned on his emergency lights as he pulled into the rest area. This, in turn, activated the WatchGuard recording system in his vehicle which captured all of what transpired between Cst. Allain and Ms. Sidney. The recording includes both audio and video throughout the investigation. It became an exhibit at trial.

[11] The recording reveals that Ms. Sidney stated from the outset that she had not been driving the vehicle. She also became upset when the officer made physical

contact with her as he attempted to guide her to the front of the police vehicle. On more than one occasion she requested that he not touch her. After he continued to do so, she pushed his hand away, leading to her arrest.

[12] After Ms. Sidney allegedly refused to provide breath samples, and Cst. Allain exited the police vehicle to deal with the impoundment of the vehicle in question, she managed to call 911 to complain about the officer's conduct.

### **Positions of the Parties**

[13] The Crown submits that the officer was justified in speaking to Ms. Sidney as a result of the initial complaint, and that after interacting with her, he had reasonable grounds to suspect that she had been recently driving the vehicle in question after having consumed alcohol.

[14] The Crown contends that the officer demanded that Ms. Sidney provide breath samples into an approved screening device on three separate occasions, twice in plain language and once by way of a formal demand. The Crown maintains that Ms. Sidney understood the demand being made, but was uncooperative. Her state of awareness as to what was occurring is evident based on her call to 911 while in the back seat of the police vehicle.

[15] According to the Crown, the officer's opinion that Ms. Sidney was unwilling to cooperate by providing samples of her breath is unassailable.

[16] Mr. Campbell submits that Ms. Sidney was cooperative until the officer laid his hands on her. Although the defence concedes that Ms. Sidney ultimately became

obnoxious and unruly with Cst. Allain, this only occurred after he introduced tension into their interactions by being argumentative with her, and by physically touching her despite her requests that he not do so.

[17] The defence challenges the Crown's assertion that the officer made three breath demands. Additionally, the defence argues that the wording of the formal demand is complicated, and that the officer should have asked Ms. Sidney after the demand whether she would blow into an approved screening device.

### **Analysis**

[18] The sole issue to be resolved in this trial is whether the Crown has proved beyond a reasonable doubt, that Ms. Sidney refused the approved screening device demand.

[19] The elements to be proved in a case of this nature are: 1) a valid demand, 2) the refusal or failure to provide the required breath sample; and 3) an intention to fail or refuse to provide the required sample (*R. v. Goleski*, 2014 BCCA 80, at para. 71; *R. v. Grant*, 2014 ONSC 1479, at para. 81).

[20] The Court in *R. v. Butler*, 2013 ONSC 2403, addressed the *actus reus* element as follows, at para. 41:

The *actus reus* or the conduct element involves a proper demand and a refusal or failure to comply with that demand. *Moser*, at para. 33. Determining whether the Crown has established, beyond a reasonable doubt the *actus reus*, requires an examination of all the circumstances where the refusal is based on a constructive refusal as opposed to an outright or express refusal. ...

[21] Kenkel J. in *R. v. Tavangari* (2002), 55 W.C.B. (2d) 12 (O.N.C.J.), set out that a court must consider “the totality of the circumstances of the entire transaction between the police officer and the accused”.

[22] In terms of the *mens rea* element, the Court in *Grant* stated, at para. 82:

The determination of whether the last element above, the *mens rea* component, is satisfied beyond a reasonable doubt will require a case-specific analysis of all the circumstances, including the following:

- i) the words and actions of the detainee from which the officer concluded he or she intended to refuse to provide a suitable sample;
- ii) the number of opportunities the officer provided to the detainee;
- iii) the instructions provided to the detainee by the officer including any reference to the applicable law, how to provide the sample, and whether the detainee was told they were being given one last chance to provide the breath sample;
- iv) the detainee's state of intoxication and attitude;
- v) the availability of the technician and Intoxilyzer; and
- vi) where the detainee has been told that he or she has refused to provide a suitable sample and will be charged and indicates they want another opportunity, the time between being told of the charge and the offer, the number of opportunities to provide a breath sample and previous "last chance" offers, and the manner in which the offer is made. These criteria will assist in determining whether the request was *bona fide*.

[23] In the matter before me, the defence does not challenge the validity of the demand. I agree that the investigating officer had the requisite “reasonable grounds to suspect” to make a demand to Ms. Sidney pursuant to s. 320.27(1)(a) of the *Code*.

[24] Turning to the *actus reus* of the offence, it is important to consider the events as they unfolded, especially the relatively short period of time when the breath demand is addressed.

[25] The video recording from the police officer's car reveals the following. Ms. Sidney interacts well with the officer initially. She provides her name as requested by the officer. Although she disagrees that she had been driving, she responds in a respectful manner. On the other hand, the investigating officer's approach to the defendant is verbally aggressive and accusatory. When Ms. Sidney states to him that she had not been driving, instead of responding that he had good reason to believe that she was, he says, "don't lie to me".

[26] After detaining Ms. Sidney for an impaired driving investigation, Cst. Allain verbally directs her towards the front of the police vehicle. In doing so, he touches her on the arm in an attempt to guide her toward it. She requests politely that he not do so. He responds by stating aggressively "you need to start listening", and subsequently states loudly "move there", while pointing to the police vehicle.

[27] When requested to do so by the officer, Ms. Sidney removes her hands from her pockets. When asked again to move in front of the vehicle, she says "yeah". She hesitates in moving towards the vehicle, prompting the officer to again guide her there. She repeats that she does not want to be touched. Although at this point, the officer and Ms. Sidney have moved closer to the front of the vehicle, and are clearly in the line of sight of the video-recording system, the officer again puts his hand on Ms. Sidney's arm. She responds by stating loudly to not touch her while brushing his arm away. As

a result of this, Cst. Allain arrests her for assaulting a peace officer and impaired operation. The arrest occurs within 85 seconds of his first interaction with her.

[28] The officer handcuffs her and places her in the police vehicle, but does not provide her with her right to counsel. When she questions the officer as to why he is manhandling her, he accuses her of “taking a swing” at him. This statement is inaccurate.

[29] Cst. Allain leaves the vehicle to converse with another officer who has arrived on scene, and to talk to the passenger of the subject vehicle. When he returns to the police vehicle, he states forcefully to Ms. Sidney, “So why were you lying to me?” Soon thereafter, he advises her that she is not listening to his instructions. He continues to argue with her about the interaction in front of the police vehicle that led to her arrest.

[30] Three minutes after she was first detained, Cst. Allain finally advises her that he needs to get breath samples from her. She does not respond to his question as to whether she understands, but mentions the marks on her fingers. She is concerned about the tightness of the handcuffs, so the officer readjusts them. When the officer reiterates that he can tell that she has been consuming alcohol, she suggests that she be taken to the “drunk tank”. The officer replies in the negative, and says that he needs to demand a sample of her breath, to which she replies “no”. Soon thereafter, she speaks over him as he commences to tell her that if she does not provide a sample, she will be charged with refusal.

[31] Ms. Sidney does not reply to Cst. Allain’s request to provide her date of birth, prompting him to state to her that he may charge her with obstruction. She says that



she would like to deal with the other police officer on scene, but Cst. Allain tells her that she does not have a choice. As he continues to request her date of birth, Ms. Sidney's behaviour deteriorates. She tells Cst. Allain that she will see him in court, and that she would like to go to the "drunk tank or whatever it takes".

[32] Cst. Allain commences reading the formal approved screening device. As he advises her that he has a reasonable suspicion that she has consumed alcohol and has been driving a motor vehicle, she asks him where he saw her. She appears to be asking him where he saw her driving. He does not stop to explain that it is not necessary that he see her driving, but continues reading the demand. When he finishes and asks her if she understands, she replies "So where did you see me?"

[33] Ms. Sidney then becomes verbally abusive with Cst. Allain. He asks her if she understands the demand. She replies, "hey bitch, do you understand what I just said?" She then berates him. He advises her she is now under arrest for uttering threats. At this point, he leaves the vehicle to speak to the passenger of the suspect vehicle. While he does this, and secures the suspect vehicle, Ms. Sidney phones the RCMP dispatch to complain about the officer's conduct. While she talks to the RCMP dispatch operator, the officer returns to the police vehicle and tells her that she is under arrest for refusal, and commences reading Ms. Sidney her right to a lawyer.

[34] The law is clear that a refusal to provide a breath samples can be by words or actions. As stated in *R. v. Adams*, 2015 ONCJ 696, at para. 38:

...While, each case very much turns on its own facts, those premised on an allegation of refusal tend to focus on whether the conduct of the

charged driver unambiguously amounts to a rejection or repudiation of an officer's demand.

[35] In *R. v. Bijelic* (2008), 77 W.C.B. (2d) 118 (O.N.C.J.), the Court stated at para. 30 that:

"[e]vidence of a refusal may arise from conduct of the detained motorist, his or her statements to the officer in the course of the ASD testing process, or from a combination of conduct and statements. Refusal to comply may be quite express or may logically be inferred from the totality of the detained driver's behaviour".

[36] It is without question that Ms. Sidney's behaviour deteriorated over the course of this investigation. However, I also find as a fact that Cst. Allain's behaviour escalated the situation. He was dealing with an Indigenous woman who he suspected had driven a motor vehicle after having consumed alcohol. She asked him politely to refrain from touching her while he was directing her to the front of the police vehicle. Instead of displaying some patience with Ms. Sidney, the officer repeated the physical contact of which she had complained. Although the officer had the right to control the situation, unfortunately, he displayed little sensitivity in his initial interactions with Ms. Sidney. On the third occasion, when he put his hand on her arm, it is unclear why he was doing so, as they were close to the front of the police vehicle which is where he wanted her to be. The seemingly unnecessary touching of her person triggered an escalation of emotions, and her response of pushing the officer's hand led to her arrest.

[37] The police obviously have a difficult job, and are at times poorly treated, but it is important that they remain calm and, where possible, that they attempt to de-escalate situations, as opposed to engaging in behaviour that may well have the opposite effect.

[38] The Crown fairly conceded that the officer could have done a better job explaining the demand to Ms. Sidney, but argued that the explanation given was nonetheless sufficient. The Crown argued that the investigating officer made three requests that Ms. Sidney provide a breath sample. However, initially, he simply advised her that he was seeking a breath sample from her. When asked, she does not indicate whether she understands what the officer has said, and appears pre-occupied with the tightness of the handcuffs on her.

[39] Also, unfortunately, the officer's mention of obtaining breath samples was interrupted by other events. After the first mention of breath samples, as indicated, he quite properly took the time to readjust the handcuffs on Ms. Sidney. After the second indication that he "needed to get" a breath sample, the officer switched gears by seeking Ms. Sidney's date of birth. This repeated question by the officer temporarily sidetracked the issue of breath samples, as Ms. Sidney refused to provide her date of birth, and the officer subsequently suggested she could be charged with obstruction.

[40] Cst. Allain ultimately read the formal breath demand for the approved screening device, but when he asked her if she understood it, she responded with a question. When she was asked again if she understood it, her behaviour deteriorated. The officer did not attempt to diffuse the situation, slow things down, or ask her in simple language if she was willing to blow into an approved screening device.

[41] The officer was clearly frustrated by his difficult interactions with Ms. Sidney. However, cumulatively, his actions, including his aggressive and accusatory tone, significantly heightened the tension between them. In this climate, he would have been

better served by clarifying whether she would provide a sample of her breath if presented with an approved screening device.

[42] In my view, no concrete effort was made by the officer to satisfy himself that Ms. Sidney was rejecting his demand, and that she would not provide a sample into an approved screening device.

[43] Based on all of the evidence, I am unable to find that Ms. Sidney's actions and words amounted to a rejection of the officer's demand.

[44] Therefore, the *actus reus* of the offence has not been proved beyond a reasonable doubt. In the result, I find Ms. Sidney not guilty of the charge of refusing to provide a breath sample.

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CHISHOLM T.C.J.