Citation: *R. v. Roy*, 2022 YKTC 47

Date: 20221013
Docket: 21-00588
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Killeen

REX

v.

BLAKE LESLIE DALLAS ROY

Appearances:
William McDiarmid — Counsel for the Crown
David C. Tarnow (by telephone) — Counsel and Agent for the Defence

RULING ON *VOIR DIRE*

[1] KILLEEN, T.C.J. (Oral): The accused is charged with impaired operation of a conveyance and a related blood alcohol charge from October 30, 2021, at Whitehorse. The case commenced on September 6, 2022, and completed on September 8, 2022. The accused had filed an application alleging a breach of his rights under ss. 8 and 9 of the *Charter of Rights and Freedoms*. By agreement, all the evidence was heard during a *voir dire*, with an agreement that admissible evidence would later be taken as read in on the trial proper. This is the decision on that *voir dire*.

The Evidence

[2] On October 30, 2021, officers on general patrol noticed a vehicle driving near Porter Creek. It was about 2:30 a.m. and the vehicle headlights were not working. The officers decided to stop the vehicle.

[3] Cst. Fox approached the driver and told him why they had stopped him. The driver, the accused, Mr. Roy, was identified by means of a driver's licence. Another man was on the passenger side of the front seat and a third man was in the rear.

[4] Cst. Fox had a discussion with the accused. The accused said that they had been at Whisky Jacks, an establishment about 200 metres from where they had been stopped. He had had a couple of drinks in the last hour. The officer asked him if he had anything to drink in the last 15 minutes. He said he had not.

[5] Although the issue of admissibility of the comments on the trial was not raised, the answers of the accused are relevant to the issues on the *voir dire*.

[6] Cst. Fox saw that the accused had a flushed face, red in colour. Based upon his observations and the admission of drinking, the officer said he formed a suspicion the accused had alcohol in his system. He had seen him drive. He made a demand that the accused provide a sample into an approved screening device. He asked the accused if he understood, and the accused responded that he did. The demand was shortly after the stop, at 2:35 a.m.

[7] The officer had performed about five other investigations of this sort. He had received his training in Whitehorse in May 2020. He understood that the approved

screening device tests for alcohol in the system of the subject providing the breath. He had no training in the accuracy of the device. He checked the expiry date at the start of the shift to make sure that the device was ready to be used. He was aware that mouth alcohol is capable of providing a false reading and understood that he was to wait 15 minutes after the last drink to avoid the possibility of contamination by mouth alcohol.

[8] He took the screening device to the accused and told him how to provide a sample. It took about four minutes for the accused to provide a sample. He blew a fail. That provided Cst. Fox with grounds to arrest him.

[9] The officer and the accused went to the police car, where the officer told the accused the reason for his arrest. He told the accused of his right to counsel. The accused understood and waived his right to counsel. The officer also told the accused that he had a right to remain silent.

[10] The two other men got out of the truck and waited for a taxi. The police called a tow truck, although the time of the call was not in evidence. The breath demand was read at 2:49 a.m. and the accused agreed to provide samples for analysis. He was to go to the Whitehorse detachment for the analysis.

[11] While they were still waiting for another officer to wait with the vehicle, Cst. Fox's partner, Cst. Cook, searched the truck. He reported that he had found open alcohol in the truck. He poured the alcohol out. Cst. Cook told Cst. Fox, who made no other inquiries of the accused.

[12] At the detachment, a qualified technician set up the approved instrument. Cst. Fox began the observation period before the first breath test. At 3:20 a.m., the first sample was obtained. Cst. Fox was not present for that sample. The accused was then observed for the second time. The notes made during the first observation period included that the accused was not slurring, had a red face, an odour of liquor, and nothing else noticeable. The notes of the second observation period included what the accused was wearing and what he did for employment.

[13] In cross-examination, Cst. Fox was asked about the open liquor. He acknowledged that it was possible the accused had been drinking in the truck. However, when he had asked the accused about that, the accused had denied drinking anything in the last 15 minutes. Cst. Fox did not think he had an obligation to believe anything otherwise.

[14] His notes from the time did not record asking a question of drinking in the preceding 15 minutes. His typed report did include that detail. He did not recall when he had completed that report. It would have been appropriate for him to make a note of the question; however, I believed his evidence when he said he asked that question.

[15] Counsel asked about his training on the use of the alcohol screening device. He was not sure if he had received a copy of the operator's manual, although he may have received one by email after he took the course. He did not recall some of the requirements prior to a screening device test. He should have checked whether the accused had taken anything by mouth or smoked before the test. He agreed that he might have completely forgotten about those requirements.

[16] Cst. Fox also testified to what might be described as a limited purpose in conducting the observation periods before the breath samples at the detachment. His focus was on watching for burping or belching by the accused. Such a thing could result in mouth alcohol, and he would have had to restart the observation period. He did not observe anything like that during his observations of the accused.

[17] Cst. Parent was the qualified technician who performed the breath tests that night. He said his practice is to tell the officers how to perform the observation period. He tells them to be alert to vomiting, burping, and belching. The concern is that stomach contents might contaminate the mouth and result in a false reading.

[18] Cst. Parent also indicated that his practice is to check the mouth of the subject before the observation period. That allows him to be satisfied that they do not have something in their mouth. He did not appear to be aware that the resource reading material for the INTOX EC/IR II, the approved instrument used here, calls for the mouth to be checked before each test. His evidence was that if he checks the mouth before the first test, finds nothing, and the subject is then under observation, the subject could not have some object in their mouth before the second test.

The Allegations of *Charter* Breaches

[19] The accused filed an application, arguing that his rights pursuant to s. 8 and s. 9 of the *Charter of Rights and Freedoms* were breached by the attending police officers.

[20] Several issues were specified:

- the failure of Cst. Fox to consider mouth alcohol, smoking, or a possible object in his mouth;
- the failure to consider the presence of alcohol in the vehicle;
- the failure to check the mouth of the accused for foreign material before each sample being provided;
- the lack of proper observation periods; and
- the failure to generally follow best practices for such breath tests.

The Argument

[21] An officer receives training in how to conduct a screening device breath test. Training is not extensive, but does alert the officer to the potential for a false reading. As the device is designed to analyze breath from the lungs, it can give a false reading if the breath sample also includes alcohol from inside the mouth of the subject. To avoid that problem of false readings, the operators are taught not to take samples if the subject has consumed alcohol within the preceding 15 minutes.

[22] If the officer knows that there has been such recent consumption, then they are not entitled to rely upon a fail reading. They cannot have a reasonable opinion if they form the opinion by relying on a reading that they know may be false.

[23] However, the mere possibility that an accused may have consumed alcohol recently will not be sufficient to set aside any belief of the officer (see *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 38).

> … once a police officer has, in fact, a reasonable suspicion of alcohol in the body, the use of the ALERT test is warranted and the officer may rely on the results of that test in order to make a breathalyzer demand. The mere possibility that the ALERT test might have been inaccurate because of alcohol consumed shortly before driving and within the 15 minutes prior to the test is insufficient to invalidate the reasonableness of the officer's belief based on the result of the test.

[24] The ALERT has been replaced by the Alco-Sensor FST, but the law remains the same.

[25] The issue of reliance on the screening device fail to provide reasonable grounds to make a breath demand for samples to be analyzed by an approved instrument has been considered many times.

[26] Recently, a similar issue was considered by Cozens, C.J., in *R. v. Scarizzi*, 2021 YKTC 33. I do not intend to repeat the analysis conducted by Chief Judge Cozens. His conclusion was that the jurisprudence allows an officer to rely on an "honest belief" even if the officer has not followed the procedure and operational instructions, as long as the officer does not intentionally ignore obvious indicators of residual mouth alcohol.

[27] I also conclude that it is the state of the law. It might have been simple to say that when an instructional manual sets out clear and reasonable steps for an operator to

follow, the officer should follow them. However, that does not appear to be the requirement.

[28] *Scarizzi* was appealed to the Yukon Territorial Supreme Court, which upheld the decision.

[29] At para. 56 of *R. v. Scarizzi*, 2022 YKSC 27, Justice Wenckebach stated:

> Taking into consideration the Ontario Court of Appeal's statements in *Notaro*, the best practice is for the police officer investigating an offence under s. 320.14 is to turn their mind to the possibility that the ASD may provide inaccurate results because of mouth alcohol, smoking, or because the suspect has something in their mouth. They must then use their professional judgment in determining if they have reasonable and probable grounds to demand a breathalyzer. It is the context that decides what their next steps should be.

[30] The accused also relied on *R. v. Au-Yeung*, 2010 ONSC 2292, although the factual basis for finding a s. 8 breach in that case is completely different from the evidence in this case.

The Mouth Alcohol Contamination Argument

[31] Cst. Fox was aware of the issue when he made the demand for the screening device sample. The accused had said he was coming from an establishment that was a short distance away. Although the establishment was not described, it is a fair inference from the name that alcohol was served there. The accused was asked about drinking. He said he had had two drinks in the last hour. He was asked if he had drunk anything in the last 15 minutes and he said no.

[32] The accused argues that when Cst. Cook found open liquor in the truck, Cst. Fox should have realized that the accused might in fact have consumed liquor just prior to the stop. If so, that would have resulted in a false reading on the screening device. The accused argues that the basis for the belief that the accused was committing on offence under s. 320 of the *Criminal Code*, that is that he was impaired or had 80 or more milligrams of alcohol in 100 millilitres of his blood, could not have reasonably existed.

[33] Where an officer is aware that a driver has consumed alcohol very recently, he is required to wait long enough to allow the mouth alcohol to dissipate. Officers are taught to use a waiting period of 15 minutes from the last consumption.

[34] Here, the officer had asked the accused if he had consumed any alcohol in the last 15 minutes. The accused had replied no.

[35] Would the presence of open liquor in his vehicle reasonably lead to a conclusion that the accused had lied?

[36] The presence of open liquor was not more fully described. In any event, there were two passengers in the vehicle. That points to a number of possibilities. One, all three occupants were drinking in the car just before it was stopped. Two, only one or both passengers were drinking in the car just before it was stopped. Three, the accused and one passenger were drinking in the car just before it was stopped. Four, only the accused was drinking in the car just before it was stopped. Five, none of them were drinking in the car just before it was stopped. The liquor was there but it had not been consumed by anyone in the last 15 minutes before the stop.

[37] The presence of the liquor does not lead only to the conclusion that the accused had been drinking before the stop. It leads only to the possibility that he had. Similarly, his proximity to a drinking establishment could lead to that possibility.

[38] How would the officer know if he had just been drinking?

[39] He could ask him. In fact, he had asked him and the accused had said no.

[40] What else could the officer do?

[41] The passengers might have known, but neither were identified. It is easy to imagine that a person in these circumstances, about to get a ride or cab to get home, might not be inclined to complicate their situation by admitting that they were just drinking in a vehicle. Although there is no evidence of their relationship with the accused, he was giving them a ride. It is easy to see why someone might decline to say that their friend or acquaintance or relative or whoever was drinking in the car just before being arrested.

[42] The officer might have asked the accused again. However, he never considered that. I do not find that to be surprising. He had an answer that made sense to him. The open liquor did not change that, since it did not point inexorably to a conclusion that the answer was wrong. There was no reason to conclude the breath result from the screening device was unreliable.

[43] I find no breach of the *Charter*.

[44] Several other issues arose about the manner in which the observation period was conducted or the way in which the training was disregarded. Again, it would seem preferable that an officer conducting breath tests follow the procedure that they have been taught and maintain familiarity with the operator's manual. However, the *Criminal Code*, under s. 320, includes a number of presumptions with respect to the accuracy of certain things.

[45] Section 320.31 does not include a requirement that the procedure set out in the operator's manual — for example, that the operator check the subject's mouth before each sample — be complied with before the sample can be considered accurate. Parliament is entitled to provide evidentiary rules or shortcuts. No evidence was before the Court to deal with the point, likely because the presumption under s. 320 deal with the issues in any event.

[46] I do not find that any of the actions or inactions by the officers that do not conform with the operator's manual render the reliance on the samples to be inappropriate.

[47] I find no breach of the *Charter* and all of the evidence on the *voir dire* except the comments by the accused are admissible. Based on the earlier agreement, all of that evidence except the words by the accused will be taken as read in on the trial proper. The exhibits which were filed on the *voir dire* are being filed on the trial proper. I will

simply indicate that whatever their designation was on the *voir dire* is simply to be the designation on the trial.

[DISCUSSIONS]

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KILLEEN T.C.J.