

Citation: *R. v. Allison*, 2024 YKTC 11

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Docket: 23-00034  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before Her Honour Judge K.L. McLeod

REX

v.

JOSEPH DONALD JAMES ALLISON

Appearances:  
Jaidan Merry  
Cody Civiero

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] MCLEOD K.L. T.C.J. (Oral): Mr. Allison is charged with the operation of a car while impaired by a drug.

[2] On May 20, 2022, as a result of information received, Cst. Gregorash went to the Walmart parking lot in Whitehorse and found Mr. Allison slouched over the steering wheel of his car; he was sleeping. Also sleeping in the passenger seat was his girlfriend, Ashley Schultz.

[3] The officer knocked on the window and woke up Mr. Allison, who appeared startled and then fell back to sleep. He struggled with understanding how to roll down his window, eventually responding to the officer's instruction to put the ignition on and press the appropriate control.

[4] In terms of her observations, the officer variously described Mr. Allison as being "very mellow", "just tired". She described how during routine questioning she would have to wake him up, but he would fall back to sleep after a few seconds. As a result, Cst. Gregorash formed the requisite suspicion and the officer read the required demand for the standard road sobriety tests. She called Cst. Moore, a qualified Drug Recognition Evaluation Expert ("DRE Officer"), to the scene.

[5] Upon informing herself that the appropriate demand had been made and after further speaking to the officer, Cst. Moore administered the standard field sobriety testing ("SFST") and as a result of her conclusion that Mr. Allison performed poorly on the tests, she formed her opinion that he was impaired by drug, provided her grounds to Cst. Gregorash, who then arrested Mr. Allison and made the DRE demand as provided by s. 320.28(2) of the *Criminal Code*.

[6] The DRE test was administered, and as a result of Cst. Moore's conclusion that Mr. Allison was impaired by a Narcotic Analgesic ("NA"), a urine sample was obtained, which results confirmed that Mr. Allison's urine contained a NA namely Fentanyl, and also Cocaine, Diphenhydramine, or an anti-allergy drug, and Clonazepam, an anti-anxiety drug.

[7] The real issue in this case is whether the Crown has proven beyond a reasonable doubt that Mr. Allison's obvious signs of impairment were ones that were caused by a drug as opposed to exhaustion. There were no *Charter* issues in this case.

[8] The presumption contained in s. 320.31(6) of the *Criminal Code* provides that where the analysis of the substance seized, in this case urine, demonstrates that the person has a drug in their body that is of a type identified by the evaluating officer to have impaired a person's ability to operate a conveyance, then that drug (meaning the drug identified through toxicologically testing) is presumed to be the drug that was present in the person's body at the time the conveyance was being operated and "on proof of the person's impairment" to have been the cause of that impairment, unless there is evidence to the contrary.

[9] Thus, the Crown has to prove firstly that impairment existed to allow the presumption to apply. Even then, evidence to the contrary can rebut this presumption, which is evidence from which the presiding judge can conclude that the apparent impairment of the defendant had a more benign explanation; in this case that of exhaustion. Obviously, testimony that proffers an alternative explanation is subject to an acceptance by the judge that it could raise a reasonable doubt as to the causes of the impairment. However, testimony that is not believed, or is rejected, cannot become "evidence to the contrary".

**Question No. 1**

*Was Mr. Allison Impaired?*

[10] I will review the evidence.

[11] The arresting officer was asked whether mere tiredness, as opposed to the effects of drug use, could have accounted for the presentation of Mr. Allison.

Cst. Gregorash testified that it appeared to her that Mr. Allison's symptoms were more than exhaustion. She described that it was her experience, as an officer, that a person being approached by the police usually wakes up. She said she had never seen anyone that sleepy during such an interaction, thus leading her to the validity of her suspicion to make the demand.

[12] I will now turn to the evidence of Cst. Moore in her role as a DRE Officer.

[13] The process involves 12 steps, the results of which inform her opinion as to whether to make the urine demand. I will go through each of the 12 steps that she followed in her interview with Mr. Allison.

1. **Interview with Arresting Officer:** Cst. Moore was familiar with Cst. Gregorash's grounds and observations from the scene.
2. **Rule out Alcohol:** That is to ensure that it was not the use of alcohol that was the cause of, or contributed to the symptoms. There appeared to be no issues with respect to alcohol consumption.

3. **Preliminary Examination:** This involves the taking of pulse, and a discussion with the subject confirming food intake, medical concerns, treatment, or physical disability. There was no such issue with Mr. Allison.
  
4. **Horizontal Gaze Nystagmus Test:** This test essentially looks at the ability of the eyes to move as far as possible from side to side following a small object. If the eyes jerk or bounce around, the test is failed. Mr. Allison had what the officer described as drooping eyes, and drowsiness; she called it sleeping, or “on the nod” as she had to continuously instruct him.

Vertical Gaze Nystagmus is the same test only it tests the ability of the eyes to go up and down.

Lack of Convergence: This is when a subject is asked to look at an object close up and the pupils fail to converge to focus on the same object. For example, the eyes drift outward.

The officer found it difficult to conduct these eye tests as, I have said, Mr. Allison’s eyes were drooping. She said she continually had to instruct him to follow the small object but she did not notice any nystagmus on either the horizontal or vertical test. I asked her to clarify this statement as to whether there was no nystagmus or whether because of his closing eyes, she could not conduct the test. Her

answer was "both". She described him as "on the nod" which I understand to be drifting in and out of consciousness.

With respect to the lack of convergence, she found there to be evidence, one eye stared straight ahead and one drifted to the left and then back. Thus, she considered that Mr. Allison had failed the test.

**5. Divided Attention Test:** This consists of a number of tests:

(a) Modified Romberg Balance Test: Mr. Allison was instructed to stand heels and toes together, hands by the side, tilt his head back, close his eyes, and remain that way until he considered 30 seconds to have elapsed, then, tilt his head forward and say stop. The officer stopped the test at 90 seconds during which time she noted Mr. Allison was swaying forward but he did not break his balance on his feet or fall. Rather she described it as a "hinging motion". When the 90 seconds elapsed, he responded that he had counted to 30.

(b) Walk and Turn Test: This test requires a subject to walk nine steps forward in a straight line, heel to toe, turning, and returning another nine steps. During the instruction phase, Mr. Allison could not keep his balance with one foot in front of the other, and hands by his side. On the walking test, he apparently succeeded on the first nine

steps but turned contrary to directions by spinning on the heel of his foot, and on the return, he missed the step between fifth and sixth step, and stepped off the line on step two, and was continually raising his arms.

(c) One Leg Stand: During this test, the standing leg is tested while the other leg is raised six inches off the ground while the subject counts. Mr. Allison was apparently only able to count for a very short period of time before putting his raised foot down, and was unable to balance without swaying or raising his hands. Furthermore, his standing leg would shake.

(d) The Finger to Nose Test: This test involves instructions to tilt the head back, close the eyes, and touch the tip of the nose with an index finger, and immediately return his hands to his side. Mr. Allison had to be told to put his head back, and for the first two attempts there was a delay in returning his hand to his side. On the remaining four attempts, he passed the task.

6. **The Clinical Indicators Test:** That is, again, the taking of a second pulse, blood pressure, and temperature reading. The pulse was below the DRE average as it registered 58, whereas 60 is the average. The officer had not given the first pulse result but did testify that the first

result was also below the DRE average, which I now take to mean that both tests were now showing a slower pulse than expected by the DRE average.

Mr. Allison's blood pressure was 116 systolic and 78 diastolic. The 116 reading is below the DRE average range of 120 to 140, but the 78 reading was within the average range. Mr. Allison's temperature was 35.6 degrees Celsius, which is below the DRE average range of 37 degrees Celsius.

7. **The Checks of Pupil Size:** This involves the checking of Mr. Allison's pupil pupils in darkness, room light, and direct light. In room light, his pupils were 2.5 millimeters which is at the smallest end of the acceptable range. In darkness, his pupils were 4.0 millimeters on his left eye and 4.5 on his right eye. The DRE average is 5.0 to 8.0, therefore, his pupils were smaller than the DRE average.

In direct light, his pupils were 1.5 to 2.0 on his left side, and 2.0 on his right side. The DRE average is a range from 2.0 - 4.5 millimeters so again, it was at the very lowest end, or below the average.

Also, while in the dark room, the DRE Officer checks the nasal area and oral cavity. Mr. Allison had what Cst. Moore described as stringy saliva, or, as she alternatively called it, "cotton mouth".



8. & 9. **Tests 8 and 9:** These tests were to check for muscle tone and injection sites and a third pulse test. The DRE Officer asked Mr. Allison to remove his sweater. She checked his muscle tone and looked for injection scars. She described his skin as being cool, he had clammy hands but nothing else was notable. Once again, she took his pulse, noting it to be at 60 beats per minute, the lowest point of the DRE range.

10. **Interview:** There were no details of any interview with Mr. Allison sought to be admitted into evidence.

11. **Final Observations:** Cst. Moore noted that Mr. Allison was calm and cooperative, but that he was uncoordinated. She said that his speech was drawn out, and he was continuing to fall asleep during the evaluation, or, as I said, what she described as "nodding off" with his breathing being shallow. Furthermore, she noted that when in the dark room, sitting knee to knee, Mr. Allison fell off his chair when he fell asleep. Fortunately, he was uninjured.

[14] Additionally, Cst. Moore said, as she was making notes between the stages of the DRE test to record her observations, Mr. Allison would fall asleep while sitting on the bench waiting for her.

[15] In forming her conclusion, Cst. Moore said she considered all the options given her view that there was a drug in Mr. Allison's body, she considered that his heart rate and blood pressure were down, his dry mouth, raspy voice, shallow breathing, being "on

the nod" and his inability to count time, which appeared to him to be moving much more slowly than it actually was, so she formed the opinion that he was impaired by a NA. As a result, she made a demand that he provide a urine sample.

[16] Elizabeth Hird was qualified to provide opinion evidence on the measurement of mental and motor effects of alcohol and drug on the human body. She was also permitted to provide expert evidence on the absorption, distribution, and elimination of drugs in the human body.

[17] Ms. Hird's report was filed as an exhibit which, as detailed above, showed evidence in Mr. Allison's urine of Fentanyl, Cocaine, Clonazepam, and an antihistamine. She testified that Fentanyl falls under the class of a NA.

[18] Ms. Hird testified that this classification, that of a NA, is particular to the Drug Recognition and Evaluation Program. It refers to all opioid drugs & their synthetics exclusively. Apparently, in the pharmacological world, a central nervous system depressant is the catch-all category under which NAs fall as there are many other drugs which have the same effect, that of a system depressant.

[19] Thus, I understand this to be the situation: The separation of NAs and Central Nervous System Depressants ("CND") in the DRE world, requires the Drug Evaluator to be much more specific as to opioid drugs and NA. NA pinpoint pupils are specific to NA Drugs. Ms. Hird also described that while both NA and CND drugs both sedate the body and cause drowsiness, there are some differences between the two, and one which I specified is that of pinpoint pupils being specific to NA drugs, but not to the rest of CND drugs. The way they work on the body is slightly different.

[20] Ms. Hird confirmed that a urine sample does not provide evidence of the amount of drugs present, or when they were consumed.

[21] She also clarified that the timing of the effect of the drugs also depends on the method of administration. Fentanyl can be taken by a patch which is used for severe pain, which has a measured absorption and would take approximately 30 minutes to effect the pain relief and would last for many hours, as it is designed to provide lengthy pain relief. If Fentanyl is smoked, injected, or taken under the tongue, the effect would be felt within minutes, and would last between two to four hours.

[22] Ms. Hird explained that once the drug has exhausted its purpose, the body will work to expel it and the urine is the last stage. She was asked to provide an estimate of how long these drugs would stay in the body. She estimated that depending on the amount of drug and how it is taken, the drug could appear in the urine for at least 24 hours after it was administered.

[23] In terms of the effect of Fentanyl, she described sedation, drowsiness, and pinpoint pupils; the latter being exclusively for evidence of a NA. She went further. The drug would slow everything down and reduce the ability to divide one's attention to many things at once. Complex tasks would be difficult, together with a reduction in the ability to react to things going on in the immediate and present time.

[24] However, Ms. Hird did also caution that the physical effects of the drug would only be felt when that drug is in the blood and in a sufficient concentration to effect reactions. Thus, she estimated that two to four hours following the intravenous or smoking ingestion is an estimate and longer if Fentanyl patch is administered.

[25] In terms of withdrawal symptoms, depending on the amount consumed and whether frequently consumed, a consumer of this type of drug may feel withdrawal effects once the drug is "no longer in your system". I understand that phrase to refer to being that the drug was out of the blood stream and processing through the rest of the body. However, Ms. Hird opined, if one takes a high dose of the drug, or uses dose after dose, the user may experience withdrawal which she described as flu-like symptoms, feeling unwell, anxiety, irritability, shakiness, and an inability to concentrate. All these things could have an effect on motor coordination, but it would be different to the effect when the drug is still in the blood, and it will be more evident in that latter phase.

[26] Unfortunately, Ms. Hird testified there is no way to differentiate in a urine sample between what is happening in the blood at the time of collection of that urine sample.

[27] Other effects of the drug would be a lack of ability to respond well to light, lowered body temperature, heart rate, and blood pressure.

[28] However, Ms. Hird was unable to form an opinion as to whether drug presence in the urine alone could impair. All the urine sample tells one is that the subject has ingested the drug previously.

[29] With respect to Cocaine, Ms. Hird described that as a central nervous system stimulant, it brings about a sense of euphoria within 15 to 30 minutes of injection or ingestion. Once it wears off, there is a crash phase, where the body would experience an intense feeling of drowsiness, and the feeling of sleepiness but at the same time as anxiousness and irritability.

[30] Following a single recreational use, Ms. Hird said Cocaine would be in the urine for at least 24 hours, which could be extended depending on the frequency or binging of the drug. That way the detection of the drug can be extended for up to 48 hours.

[31] Other effects of Cocaine would be the opposite of a NA. There would be dilated pupils to allow the body to take in as much light as possible, a fight or flight mode reaction, elevated heart rate, blood pressure, and temperature.

[32] With respect to the antihistamine, it can be used as a sedative and can cause drowsiness, although tolerance to those effects can be gained. It can be detected for about 40 hours after administration.

[33] Clonazepam has significant sedating effects. It is used for anxiety and can cause drowsiness and its effect can be tested in the performance of complex tasks. It has an extended time of detection of up to five days.

[34] So back to the first question, I have to evaluate whether the Crown has proven beyond a reasonable doubt that at the time of the DRE, Mr. Allison's ability to operate a car was impaired.

[35] Mr. Civiero argues that given the DRE results, which were in many respects at, or minimally outside the DRE standard, that such a doubt should exist. Obviously, Cst. Moore was qualified as an expert in the area of the administration of the DRE, but Mr. Civiero urges caution in relying on her ultimate opinion of impairment as this officer testified that this was her first case of using her qualifications as a DRE Officer.

[36] I disagree. Cst. Moore limited her testimony to the guidelines of the DRE averages, thus in concrete areas such as blood pressure, temperature, and pulse, she recorded Mr. Allison's results and contrasted them with the DRE averages. Cst. Moore testified what was within the average range or outside the range.

[37] Furthermore, Cst. Moore's repeated observations of Mr. Allison falling asleep, falling off a chair, together with her knowledge of the observations of the arresting officer, certainly lead to the more than reasonable conclusion that Mr. Allison was impaired. There is nothing in the DRE Officer's evidence, despite the persistent questioning by Mr. Civiero, that shows any attempt to exaggerate her testimony or to fall outside her lane of expertise. Thus, I find her testimony as to her conclusion to be one that is borne out by her observations. Having said that, that is not dispositive of the issue of impairment by drug.

[38] Obviously, I must review all of the evidence to determine whether there is evidence of impairment sufficient to allow me to make a finding beyond a reasonable doubt. As there was no evidence that led me to believe that Cst. Gregorash or Cst. Moore exaggerated the appearance and conduct of Mr. Allison, or that the evaluation test observations were incorrect, their observations cannot be disputed. Furthermore, the actual average ranges proscribed by the DRE Scheme have not been challenged. Given all of the evidence, I am satisfied, in answer to the first question, that Mr. Allison's ability to operate a car was impaired.

**Question No. 2**

*Question No. 2 is whether the presumption can apply and whether there is evidence to the contrary to rebut the presumption.*

[39] The evidence to the contrary consisted of Ms. Schultz being called as a witness. She is the girlfriend of Mr. Allison and was in the car in which he was apprehended at approximately 10:00 in the morning.

[40] Ms. Schultz explained that she had been taken by Mr. Allison to Whitehorse General Hospital in the early hours of the morning, shortly before 5:00 a.m. She had been unwell for three days prior to this. Ms. Schultz is an asthma sufferer which was accentuated, apparently, by an exhaust leak, and she had not been medicated, as she had lost her inhaler.

[41] After being released from the hospital at 7:22 a.m., they were going to travel back to Carcross but apparently access to the Carcross cut-off was blocked. They were tired so they went to the Walmart parking lot and fell asleep.

[42] While Ms. Schultz was at the hospital receiving treatment, she testified that Mr. Allison slept for a couple of hours. Medical records, which were filed, did not mention Mr. Allison's presence, but it did confirm that Ms. Schultz was treated, and there were notes that the physician went to check on her after she had been at the hospital for two and one-half hours after her original assessment by him. She was sleeping when he went to see her, but she awoke to a light touch.

[43] In terms of the preceding days, Ms. Schultz said she had been sick for three or four of these days and that Mr. Allison had taken care of her. She spent her time

sleeping, eating, watching TV, and she said Mr. Allison was with her the whole time. She denied that Mr. Allison used drugs during that time, although she did concede the obvious, that she was not with him every minute of every day. Ms. Schultz testified that she was the drug addict. At the time of testifying, however, she was proud of being clean for 14 months. She said when she did use drugs, she used Fentanyl, and she would overdose. Fortunately, Mr. Allison would be keeping an eye on her for that eventuality.

[44] Ms. Schultz attributed Mr. Allison's sleepiness to being tired because she had been driven to the hospital, then she was there for two and one-half hours and they were not able to return back to the place they were staying.

[45] While Ms. Schultz is clearly telling the truth about her visit to the hospital, she abjectly refused to accept that Mr. Allison had consumed Cocaine. She said she knows the effects of Cocaine and that sleepiness is not one of them. However, unfortunately, she must be wrong. The urine tests make it clear that she must be wrong. Not only was Fentanyl found in Mr. Allison's urine but so was Cocaine.

[46] Thus, given the results of Mr. Allison's urine sample, together with the evidence of Ms. Hird as to the timing of the elimination, Ms. Schultz's testimony that Mr. Allison was with her essentially within the entirety of the elimination period, is simply not believable. While the expert could not determine when and in what quantities the drugs found in Mr. Allison's urine were consumed, and indeed whether they would have affected his ability to perform complex tasks when in his urine, that is not essential to the Crown's case because of the operation of the presumption.



[47] Accordingly, since the type of drug identified by the DRE Officer is one of the types of drugs found within the urine sample, the Crown is permitted to rely on the presumption contained in the *Criminal Code*, that is, that Mr. Allison's impairment was caused by the consumption of the drugs identified in his urine.

[48] Finally, while I appreciate that Mr. Allison may also have been impaired through tiredness, I am reminded of *R. v. Stellato*, 1993 ONCA 3375, that any impairment attributable to the consumption of drugs is sufficient to prove impairment in law. It is not a matter of degree, nor does it mandate a finding that 100 percent of the obvious evidence of impairment is relatable only to drugs, but I am mandated because of my disbelief of Ms. Schultz's evidence as being unreliable to find that Mr. Allison's ability to operate a motor vehicle was impaired by a drug when he was discovered on May 20, 2022.

[49] Thus, there will be a finding of guilt.

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MCLEOD K.L. T.C.J.