Citation: *R. v. McGuire,* 2025 YKTC 2

Date: 20250218
Docket: 17-00542
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

JOHN HAROLD MCGUIRE

Appearances:

Neil Thomson	Counsel for the Crown
David Tarnow	Counsel for the Defence

RULING ON *CHARTER* APPLICATION AND REASONS FOR JUDGMENT

[1] John Harold McGuire proceeded to trial on a two-count Information alleging that on or about October 6, 2017, he committed offences contrary to ss. 253(1)(a) and 253(1)(b) of the *Criminal Code* in Whitehorse, Yukon.

[2] This matter originally proceeded to trial in 2020, reported as *R. v. McGuire*, 2020 YKTC 32, resulting in an acquittal. The Crown appealed to the Supreme Court of Yukon, reported as *R. v. McGuire*, 2021 YKSC 45, resulting in the acquittal being set aside and a new trial ordered. Mr. McGuire appealed to the Court of Appeal of Yukon,

reported as *R. v. McGuire*, 2023 YKCA 5, resulting in the Supreme Court of Yukon decision being upheld.

[3] The re-trial began with a *voir dire* on an application by Mr. McGuire alleging violations contrary to ss. 8, 9, and 10 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the "*Charter*"). The parties agreed to proceed with a blended *voir dire*.

[4] Mr. McGuire asserts that the police officer who administered the roadside approved screening device ("ASD") demand pursuant to s. 254(2)(b) of the *Criminal Code* could not rely on the result to form her reasonable grounds to make the breath demand pursuant to s. 254(3)(a)(i) of the *Criminal Code.* He asserts that the officer's subjective belief in the reliability of the ASD result was objectively unreasonable and presented expert opinion evidence in support of his position.

[5] Counsel for Mr. McGuire did not pursue the s. 10 *Charter* breach allegation at trial, focussing instead on ss. 8 & 9 of the *Charter* based on the reliance by the police officer on the ASD result.

Facts

[6] On October 6, 2017, at approximately 7:00 p.m., Whitehorse RCMP received a complaint regarding the dangerous driving of a tractor trailer on the Alaska Highway. Cst. Candice MacEachen responded to the call in a marked police vehicle equipped with Watchguard audio and video. The officer located the vehicle she believed to be the subject of the complaint on the Alaska Highway near the Wolf Creek Campground in the

City of Whitehorse. She engaged the emergency lights on the police vehicle and repeatedly engaged the siren in order to stop the truck, which continued for approximately five kilometers before stopping. Cst. MacEachen observed the truck to be swerving, crossing the centre line and jerking back into the driving lane during this time. Engaging the emergency lights in the police vehicle automatically started the Watchguard audio and video recording, capturing the driving pattern of the truck.

[7] Mr. McGuire was the sole occupant of the truck, accompanied by his dog. Cst. MacEachen spoke to Mr. McGuire and observed that he had glossy eyes, slurred speech and was emitting an odour of alcohol. This initial interaction was while Mr. McGuire remained seated in the truck with the driver's side door open, permitting the officer to step onto the siderail of the truck and speak directly to him. He complied with a request for his vehicle documentation. He was then advised that he was required to accompany the officer to her police vehicle to provide a breath sample due to her suspicion that he had been drinking alcohol. Cst. MacEachen was joined at the side of the truck by Cpl. Stelter who had arrived in a separate police vehicle.

[8] Mr. McGuire was escorted to the police vehicle by Cst. MacEachen where he was seated in the rear seat of the vehicle with the door open. Once seated, Cst. MacEachen read him the s. 254(2)(b) *Criminal Code* ASD demand from a card with RCMP prepared wording, which he indicated he understood. He provided four samples in total into the ASD, recorded on the Watchguard audio and video system. The video time stamp was noted to be two hours ahead of the actual time, and the following depict the times on the video:

22:05:45: Cst. MacEachen explained the procedure to Mr. McGuire, including that a new mouthpiece was being inserted into the ASD. She asked Mr. McGuire what he took out of his pocket, which was a candy, and she took it from him. She then confirmed verbally with him that he had nothing in his mouth.

22:06:16: The first sample was attempted from Mr. McGuire which was unsuccessful.

22:06:45: Cst. MacEachen explained to Mr. McGuire that he stopped blowing before she told him to stop.

22:07:00: The second sample was attempted from Mr. McGuire which was unsuccessful. Cst. MacEachen explained that she was putting a new mouthpiece on the ASD.

22:07:30: The third sample was attempted from Mr. McGuire which was unsuccessful. Cst. MacEachen explained to Mr. McGuire that he needed to keep blowing until she tells him to stop. Cst. MacEachen explained that she could tell that he was stopping and that he inhaled.

22:08:23: The fourth sample attempted from Mr. McGuire was successful and resulted in a fail.

[9] After the ASD provided the fail result, Mr. McGuire was searched for safety purposes, placed in the back seat of the police vehicle, arrested, advised of his right to

counsel, and provided the police warning. At 22:16:00 a breath demand was made to him pursuant to s. 254(3)(a)(i) of the *Criminal Code.*

[10] Cst. MacEachen testified that at the start of her shift she retrieved the ASD used on Mr. McGuire from the Whitehorse detachment, turned it on, and did a blank test to confirm that it was operating properly. She also noted that the practice is to write the expiration date on the device case, referring to the requirement that the device be tested for accuracy routinely and the date depicting the requirement for the device to be tested again before use. The ASD that she used that day was active, meaning the time had not expired. She did concede on cross-examination that she did not record the information in relation to the device and the expiry in her notes.

[11] Cst. MacEachen explained that each of the first three attempts with the ASD resulted in an improper sample, but that she does not recall what the device indicated as the reason for the improper sample. She did recall telling Mr. McGuire that he was not blowing long enough. She did not record in her notes the ASD indicator after each unsuccessful attempt.

[12] Cst. MacEachen further explained that the ASD will shut down after the third unsuccessful sample, or after three minutes. When this happens, a new mouthpiece is required, and she complied with the requirement. It was clear from the cross examination of Cst. MacEachen that she was not clear on this issue at the original trial. She did not record the shutdown of the ASD after the third attempt in her notes. However, prior to this trial, she read the manual, reviewed trial transcripts and watched the Watchguard audio and video recording of the investigation to prepare.

[13] Cpl. Stelter did record the ASD sampling in his notes, indicating that the fail occurred on the third attempt, not the fourth attempt as testified to by Cst. MacEachen. This is a clear inconsistency. However, a close review of the Watchguard audio and video clarifies that the fail was provided on the fourth attempt and Cpl. Stelter's notes were inaccurate.

[14] In cross-examination Cst. MacEachen was asked if her evidence was that after the third attempt the ASD "timed out", which she confirmed.

Expert Opinion Evidence

[15] Grant Gottgetreu was qualified as an expert witness to provide opinion evidence on the proper operation and use of the Alco-Sensor FST, the ASD used with Mr. McGuire, and on impaired driving investigations.

[16] Mr. Gottgetreu provided his initial opinion from a review of the Report to Crown Counsel, a transcript of the original trial in this matter, and a review of the decisions from the Territorial Court of Yukon, Supreme Court of Yukon, and the Court of Appeal of Yukon. He was permitted to sit through the evidence called in the Crown's case in order to provide his opinion on the evidence before this Court.

[17] Mr. Gottgetreu did not analyse the Watchguard audio and video recording during the preparation of his report. At trial, he conceded that from his remote viewing location he could not hear the sounds coming from the ASD clearly enough to testify to what was occurring with the instrument and whether it was functioning properly. No attempt on the part of Mr. McGuire was made to remedy the situation to permit him to give

opinion evidence on what actually happened during the operation of the ASD. He testified that the ASD makes audible beeps to indicate the stages of operation and the outcome of samples, successful or otherwise.

[18] In his written report, Mr. Gottgetreu stated that in his opinion there were two areas of concern with the operation of the ASD being that Cst. MacEachen did not possess the requisite knowledge or understanding of how the Alco-Sensor FST functions leading up to the fail result, and that the mandatory "confirming subject suitability" components of the Alco-Sensor FST Operator's Manual (British Columbia), Section 4.5 Confirming Subject Suitability, were not completed prior to the ASD testing being administered.

[19] At trial, Mr. Gottgetreu testified to these concerns, adding the concern that Cst. MacEachen's failure to properly articulate how the ASD shut down after the third ASD sample attempt calls into question the reliability of the fail result. That is, if the ASD in fact timed out, rather than the expected automatic shut down after the third attempt, that would indicate the ASD was not operating properly as the three-minute time lapse before timing out had not been reached. Only one minute and 35 seconds had lapsed, meaning that the ASD improperly timed out and that it was not functioning properly.

[20] I will address each of the areas of concern testified to by Mr. Gottgetreu as follows:

1. Does Cst. MacEachen's lack of knowledge or understanding of how the Alco-Sensor FST functions render the result unreliable?

2. Did Cst. MacEachen's failure to confirm "subject suitability" before administering the ASD render the result unreliable?

3. Does Cst. MacEachen's statement that the ASD "timed out" after the third attempt by Mr. McGuire render the result unreliable?

Does Cst. MacEachen's lack of knowledge or understanding of how the Alco-Sensor FST functions render the result unreliable?

[21] At trial, Cst. MacEachen was able to articulate considerable knowledge on how the ASD operates, having reviewed the manual prior to trial. Her knowledge articulated at trial was significantly higher than at the original trial. Combined with this, she stated that she reviewed transcripts of her cross-examination from the original trial and reviewed the Watchguard audio and video. The primary focus of concern having heard her testimony was on the lack of record keeping to be able to articulate to the Court precisely what was occurring with the ASD in 2017.

[22] Reasons for the lack of preparation prior to the first trial were provided by Cst. MacEachen, but they are of little relevance in this trial other than to note an acknowledgement on her part that she was poorly prepared. She should not be criticized for properly preparing on this occasion, and I am satisfied that she exhibited an understanding of the functions and operation of the ASD. To the extent that the poor record keeping was raised as a concern, I note that the ASD operation was captured on the Watchguard system, and further, that the Court of Appeal of Yukon addressed this point in *McGuire* at para. 71:

> Finally, the failure to make notes of what was happening with the ASD as it was administered, or the messages it produced, is not a best practice. However, standing alone, this was not evidence that would credibly undermine or negate the objective reasonableness of the Officer's belief in the context of the record as a whole. This included evidence of specific steps taken to verify that the ASD was working; an acknowledged awareness and understanding of things to watch for; monitoring the device and Mr. McGuire's interaction with it while it was being administered; and a stated belief, as someone who is trained in the use of an ASD, that it was "working properly".

[23] This statement applies to the evidence before this Court at trial and is unchanged by the testimony of Mr. Gottgetreu. I find that it is not evidence that would credibly undermine or negate the objective reasonableness of Cst. MacEachen's belief.

Did Cst. MacEachen's failure to confirm "subject suitability" before administering the ASD render the result unreliable?

[24] Mr. Gottgetreu conceded that he was not well versed on the law in this area and was providing his opinion based on his knowledge of the operation manual requirements for the Alco-Sensor FST.

[25] The Supreme Court of Yukon has addressed the failure of an ASD operator to confirm subject suitability in *R. v. Scarizzi*, 2022 YKSC 27, referencing specifically the opinion of Mr. Gottgetreu from the trial court proceeding in the matter. In *Scarizzi*, the Court referenced the law on this issue at paras. 11 to 13:

> 11 In *R v Bernshaw*, [1995] 1 SCR 254 ("*Bernshaw*"), questions arose about the proper use of ASDs in police investigations of drinking and driving offences. Evidence was lead that a person may have mouth alcohol for 15 minutes after they have had their last drink of alcohol. The presence of mouth alcohol can falsely elevate the reading on a roadside alcohol detection device. Thus, an ASD can provide a false reading for a person who takes the test within 15 minutes of having consumed alcohol. The Supreme Court of Canada examined whether a police officer was

> required to ask a suspect when they last consumed alcohol. The majority concluded that there is no free standing duty on the police to make such enquiries (p. 298).
>
> 12 The Saskatchewan Court of Appeal reiterated this principle in *R v Schlechter*, 2018 SKCA 45 at para. 81.
>
> 13 In *R v Notaro*, 2018 ONCA 449 ("*Notaro*"), the Ontario Court of Appeal went further. It determined that, as a police officer is not required to ask about when a driver had their last drink of alcohol, they also need not consider the issue of whether the driver had consumed alcohol within the previous 15 minutes before administering an ASD test (at para. 28).

[26] The Court in *Scarizzi* concluded that a police officer is not required to ask questions to ensure subject suitability, following an analysis of the law, at paras. 17 and 18:

> 17 I agree with Crown counsel. In *Bernshaw* the Supreme Court of Canada decided that there was no freestanding duty to inquire about the timing of the suspect's last drink because, as the suspect would not be obliged to answer the question, it would not be proper to impose a duty on the police to ask the question (at p. 298).
>
> 18 This reasoning applies equally to other questions about a person's activities that could affect the results of an ASD test. A driver has no obligation to answer questions about whether they have anything in their mouths or if they smoked within the previous five minutes. There is no obligation for them to open their mouths so a police officer can verify that they have nothing there. It would therefore be improper to impose a duty on the police to take these steps.

[27] The Court in *Scarizzi* further addressed the opinion of Mr. Gottgetreu on this issue, as summarized at paras. 24 and 25:

> 24 Mr. Gottgetreu testified that mouth alcohol, objects in the mouth, or smoking could render an ASD test unreliable. He stated that when he was still an active police officer he required his subordinate officers to ensure subject suitability by asking about when the driver had last consumed alcohol, if they had anything in their mouth, or if they had smoked within the past five minutes. He would not approve a charge in which the questions were not asked.

> 25 He also said that the ASD manual requires police officers to ensure driver suitability before administering the test. . .

[28] On this issue, the Court in *Scarizzi* concludes at paras. 32 and 33:

> 32 I am not convinced that there is a difference between the evidence in *Bernshaw* and the evidence in the case at bar. However, even if there is, the difference is not enough to make *Bernshaw* distinguishable. *Bernshaw* was not decided based on evidence about police officer training. Rather, the court determined that the duties of police officers flowed from the suspect's rights. Thus, whether a manual or policy requires that a police officer ask certain questions is not the issue. If a person is not required to answer a question, it is not proper to require a police officer to ask the question.
>
> 33 Moreover, the essential issue for the police officer is not whether they meet the requirements of the ASD Manual or police policy in order to demand a breathalyzer. The issue is whether they have reasonable and probable grounds to demand a breathalyzer. That is the legal test, and the standard with which they must comply.

[29] In the Court of Appeal of Yukon decision in *McGuire*, the Court addressed this line of reasoning at paras. 44 and 45:

> 44 In *R. v. Jennings*, 2018 ONCA 260 [*Jennings*], the Ontario Court of Appeal reviewed *Bernshaw* and held that a police officer's failure to follow a policy or an operator's manual specific to an ASD does not "automatically render" their reliance on the results produced by the ASD objectively unreasonable: ...
>
> 45 Why is this so? Because whether the ASD was, in fact, properly functioning at the time of its use, or whether a police officer did everything they were trained to do to verify that the device was operating correctly, is not dispositive of the issue. Rather, what matters for the "credible evidence to the contrary" inquiry is whether there were circumstances <u>known</u> to the police officer when they elected to rely upon the ASD result that would give the officer "<u>reason to believe</u>" the ASD was not in proper working order: *Jennings* at para. 21, emphasis added. The "evidence to the contrary" inquiry is focused on the reasonableness of the police officer's belief about the reliability of the ASD result and the choice to rely upon it, not whether the results were reliable, in fact.

[30] The law on this issue is settled, addressing the opinion of Mr. Gottgetreu specifically, and remains unchanged by the specific testimony of Mr. Gottgetreu in this trial. I find that it is not evidence that would credibly undermine or negate the objective reasonableness of Cst. MacEachen's belief.

Does Cst. MacEachen's statement that the ASD "timed out" after the third attempt by Mr. McGuire render the result unreliable?

[31] Mr. Gottgetreu was concerned by the statement of Cst. MacEachen that the ASD "timed out" after the third sample. He stated that because three minutes had not lapsed from the time the ASD was turned on, the ASD timing out would indicate that it was not operating properly and the fail result was not reliable.

[32] This concern requires an analysis of what was said by Cst. MacEachen, and what findings can be made on her testimony. The following exchanges occurred during direct examination and cross-examination:

Direct Examination

> Q: Do these devices ever automatically shut off?
>
> A: Yes, so after the third attempt or after three minutes it will shut off, and then you turn it back on, insert a new mouthpiece, and then you have another three minutes or three attempts.
>
> Q: And did that happen in this case?
>
> A: Yes, after the third one. I had to turn it back on before the fourth.
>
> Q: And was it your belief this alco- sensor was operating properly?
>
> A: Yes, it was.

Cross-Examination

> Q: So now Mr. McGuire did provide a breath of air into the device and what attempt was this?
>
> A: The fourth.
>
> Q: I see. And, what happened after the third?
>
> A: The instrument times out after the third attempt or after three minutes. It shuts off and then you have to start it back up, put a new mouthpiece on and then you can do another three samples or another three minutes.
>
> Q: Ok. And you think that's what occurred there, it timed out?
>
> A: Yes
>
> ...
>
> Q: Just taking you back for a moment to your evidence about the attempt to provide samples by Mr. McGuire. I just wanted to confirm what you indicated to us is that after the third attempt by McGuire you indicated that the device timed out and turned off, is that correct?
>
> A: Yes

[33] In direct examination, Cst. MacEachen outlined the two possibilities of the ASD shutting itself down, being after three minutes have lapsed or after the third unsuccessful sample. She then confirmed that the ASD shut down after the third sample.

[34] In cross-examination Cst. MacEachen combined the two possible scenarios of an automatic shut down of the ASD stating, "The instrument times out after the third attempt or after three minutes, it shuts off and then you have to start it back up". She refers to "times out" as either of the two reasons for an automatic shut down. The later clarifying question includes the statement "you indicated that the device timed out",

which based on the questioning to that point appears to mean to the officer that it automatically shut down. The questioning did not go any further to clarify what was meant by “timed out” and leaves the interpretation to this Court.

[35] I find that during the questioning in cross-examination, Cst. MacEachen was referring to the fact that the ASD automatically shut down after the third attempt, which is expected if the ASD is functioning properly. The conclusion that she meant that the ASD had shut down due to the lapse of time on the evidence from the questioning before me, is speculative. The Court of Appeal of Yukon decision in *McGuire* addressed the evidentiary burden on an accused raising evidence to the contrary at paras. 62 and 65:

> 62 The SCJ held there was "insufficient credible evidence of the unreliability of the ASD" for the trial judge to find that the Officer's subjective belief in the reliability of the ASD result was objectively unreasonable: at para. 78. There was no indication that the "Fail" was "compromised by the beeping or the inability of the [Officer] to explain it fully or recall the display codes before and during some of the insufficient attempts": at para. 68. It "is not enough for the accused to raise a question about the <u>possibility</u> of the ASD being unreliable": at para. 68, emphasis added. There was "no scientific evidence that the beeping created an inaccuracy in the fail result: at para. 73.
>
> ...
>
> 65 As stated, I am satisfied the SCJ correctly found that the trial judge erred in his assessment of reasonable grounds. There was no evidence of information or facts known to the Officer that would credibly undermine or negate the reliability of the ASD results and the Officer's belief in them, such that the use of those results in forming her grounds for an arrest and breathalyzer demand was objectively <u>un</u>reasonable. On this evidentiary record, a reasonable person standing in the Officer's shoes and knowing what she knew would not question the reliability of the ASD result: *Notaro* at paras. 38-41. I agree with the SCJ that the trial judge's determination to the contrary was speculative. Mr. McGuire accepts that speculation cannot ground an "evidence to the contrary" finding.

[36] On the evidence presented at trial, I find that the confusion of the officer when articulating the automatic shut down of the ASD does not negate that it did, in fact, shut down after the third attempt as the Watchguard audio and video recording depicts. Any suggestion that she was referring to the display on the ASD as indicating it had timed out is speculative and cannot ground an "evidence to the contrary" finding.

[37] I find on the evidence presented at trial that Cst. MacEachen's grounds for the arrest and the ASD demand were subjectively held and objectively reasonable. (see: *R. v. Shepherd,* 2009 SCC 35, at para. 17.) There was insufficient credible evidence presented by Mr. McGuire of the unreliability of the ASD to find an absence of objective reasonableness of the officer's belief that it was in good working order.

[38] I find that there were no *Charter* breaches under ss. 8 or 9.

Conclusion

[39] The Crown advised at the outset of the proceedings that it will not seek a conviction against Mr. McGuire on Count 1, the offence contrary to s. 253(1)(a) of the *Criminal Code*, and an acquittal is entered on that Count.

[40] A Certificate of a Qualified Technician, dated October 6, 2017, was filed by the Crown. The certificate sets out the results of two samples provided by Mr. McGuire at 21:05 and 21:26, both registering 130 milligrams of alcohol in 100 millilitres of blood.

[41] I find Mr. McGuire guilty on Count 2, being the offence contrary to s. 253(1)(b) of the *Criminal Code*.

____

PHELPS T.C.J.