

SUPREME COURT OF YUKON

Citation: *R. v. Schmidt*, 2011 YKSC 78

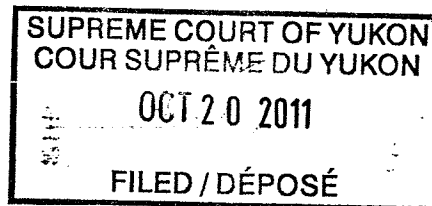
Date: 20111020
S.C. No. 10-01520
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

MICHAEL PETER SCHMIDT



Before: Mr. Justice R.S. Veale

Appearances:

Bonnie Macdonald
Gordon R. Coffin

Counsel for the Crown
Counsel for the accused

REASONS FOR JUDGMENT (Breathalyzer Demand)

INTRODUCTION

[1] Mr. Schmidt has been charged with three offences arising out of a single motor vehicle accident on the Alaska Highway on December 14, 2009. He is charged with impaired driving causing bodily harm to Jessica Frotten and Michael Sanderson. He is charged with dangerous driving causing bodily harm and he is charged with driving with his blood alcohol over the legal limit resulting in bodily harm.

[2] Counsel for Mr. Schmidt applies to have the Certificate of Analysis excluded from evidence under s. 24(2) of the *Charter* on the ground that it was obtained in breach of

Mr. Schmidt's s. 8 right to be secure against unreasonable search and seizure. The issue is whether Cst. Hack had reasonable and probable grounds pursuant to s. 254(3) of the *Criminal Code* to believe that Mr. Schmidt was committing the offence of driving while impaired by alcohol.

[3] The officer's reasonable and probable grounds must be subjectively believed regarding the evidence he had at the time before making the demand. The grounds must also be sufficiently objective to lead a reasonable person similarly situated as the police officer to conclude that more likely than not that the accused had committed the offence.

[4] Once the accused shows that the seizure was without a warrant, the Crown has the burden of showing the search was, on a balance of probabilities, reasonable.

[5] There is case precedent in *R. v. Gavin*, [1993] P.E.I.J. No. 136, followed by *R. v. Higgins*, [2001] M.J. No. 97 (Q.B.), that the mere smell of alcohol on the accused's breath along with bloodshot eyes and a bit unsteady walk combined with the knowledge that he was the driver of a motor vehicle in an accident was not sufficient. That is to say the subjective belief of the officer was not supported by reasonable grounds to justify a demand for a breathalyser under s. 254(3). The suggestion in these cases is that the police officer did not have the benefit of a full and complete investigation or have all the indicia required.

[6] *R. v. Bush*, 2010 ONCA 554, is also very helpful. In that case, the officer relied on the information of erratic driving and the reported belief that the accused was intoxicated. The officer intercepted Bush after another collision by Bush and observed the vehicle damage and spoke to the informant. He also noted alcohol on his breath,

red and glassy eyes and weaving back and forth while standing. The officer arrested Bush within "a minute give or take" of his arrival on the scene. He believed that Bush's ability to operate a motor vehicle was impaired. He did not ask Bush if he was drinking or how the accident occurred. He agreed the watery eyes could have been caused by a deployed airbag. The trial judge found the officer had reasonable and probable grounds.

[7] The summary conviction appeal court judge concluded the trial judge erred and ordered a new trial.

[8] The Court of Appeal restored the conviction of the trial judge and gave the following guidance from the case law:

1. drinking and driving prosecutions involve a continuum from reasonable suspicion being the standard from an Approved Screening Device demand at one end and at the other end, proof beyond a reasonable doubt that the driver's ability to operate a motor vehicle was impaired by alcohol. Reasonable doubt and probable grounds lies in between;
2. the officer must have an honest belief the accused committed the offence which is the subjective component. The objective component is that the reasonable person in the position of the officer would be able to conclude there were reasonable and probable grounds for the arrest;
3. the Court quoted para. 18 of *R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), where Doherty J.A. said:

... Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of

inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

4. in the context of a breath demand, the reasonable and probable ground standard is not an onerous test;

5. there is no necessity that the accused be in a state of extreme intoxication. Impairment may be established where the prosecution proves any degree of impairment;
6. the test is whether, objectively, there were reasonable and probable grounds to believe the suspect's ability to drive was even slightly impaired by the consumption of alcohol;
7. that an accident occurred including the circumstances involved must be taken into account along with other evidence. Consumption plus an unexplained accident may generate reasonable and probable grounds but that may not always be the case;
8. the totality of the circumstances must be considered and even though the accident may have caused other indicia does not mean the indicia should be totally eliminated;
9. There is no requirement that a roadside Approved Screening Device be taken;
10. the fact that the officer's belief was formed in less than a minute is not determinative nor surprising or unusual.

[9] In the case before me, the officer acknowledged that he did not have reasonable and probable grounds, when standing behind the ambulance talking to the accused, based on the following:

1. the admission that Schmidt had split a pitcher of beer;
2. he had glassy and watery eyes which could also have been caused by the wind or crying;
3. he could smell an odour of alcohol but was uncertain of its origin in the wind; and
4. another witness said Schmidt was the driver and so did Schmidt.

[10] Constable Hack then took Schmidt into the rear of the police vehicle. He did not have an Approved Screening Device. However, when he opened the partition to the backseat, he smelled a powerful odour of alcohol which he identified as coming from Schmidt's breath but could also be from his clothing. Schmidt also said he was driving too fast, hit a bump, started to skid and the vehicle left the road. Cst. Hack formed the opinion that Schmidt's ability to drive was impaired by alcohol and he placed him under arrest and made the breath sample demand.

[11] Counsel for Schmidt submits that the decision to arrest and make the breath demand was based upon the failure of Cst. Hack to have an Approved Screening Device at the time rather than having a subjective belief. He also submitted the additional grounds obtained in the police vehicle were suspect.


[12] I find that Cst. Hack did have a subjective honest belief and that the grounds are objectively reasonable and probable grounds for that belief based on the totality of the circumstances. We do not require proof beyond a reasonable doubt and in the

circumstances of this accident on the Alaska Highway on a cold day in December. It is not appropriate to put the conduct of the officer under a microscope and analyse each piece of evidence with great scrutiny. The officer's decision must be made quickly in fluid and rapidly changing situation.

[13] I do not place great reliance upon the indicia of the odour of alcohol and his glassy watery eyes. But I do place great reliance on the statements of Mr. Schmidt that he was drinking beer that day, that he was driving too fast and had an accident. Cst. Hack was well aware of the serious nature of the accident.

[14] I am satisfied that in the totality of the circumstances known by the officer at the time, there has been no unreasonable search and seizure.

[15] I conclude that the Certificate of Analysis should be admitted.



VEALE J.