

Citation: *R. v. Rowat*, 2018 YKTC 20

Date: 20180516
Docket: 16-00752A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Schneider

REGINA

v.

CURTIS STEVEN ROWAT

Appearances:
Leo Lane
Joni Ellerton

Counsel for the Crown
Counsel for the Defence

RULING ON VOIR DIRE

[1] SCHNEIDER J. (Oral): In the early morning hours of January 27, 2017, at approximately 1:40 a.m., Cst. Jury observed a vehicle travelling in the opposite direction up a hill at a high rate of speed. Her radar indicated that the vehicle was travelling at 117 km per hour in a 60 km/h zone. She was not able to describe the vehicle. There were no observations as to its make, model, colour, or size. There was no recording of a licence plate.

[2] With that, she put on her emergency lights and siren and moved up the road in order to make a u-turn. After heading in the direction that the car had apparently been travelling she lost sight of the vehicle. She described the conditions that night as simply 'dark'. However, a number of minutes and several kilometres later she came upon Mr.

Rowat in his vehicle. In her *voir dire* evidence, Cst. Jury similarly gave no description of his vehicle nor, obviously, the extent to which Mr. Rowat's vehicle matched or resembled in any way the vehicle she had earlier observed to be speeding. At the time she came upon him, Mr. Rowat's vehicle was travelling in an unremarkable manner and was not in breach of any traffic laws. Nevertheless, Cst. Jury pulled Mr. Rowat's vehicle over. Her stated purpose was to issue the driver with a ticket for speeding that had occurred at an earlier point in time. She testified that the only basis for stopping Mr. Rowat's car was that it was the only vehicle she saw on the road at the time. To be clear on that point, Cst. Jury was re-asked the question and she confirmed that this was the only basis for the stop.

[3] Cst. Jury communicated with dispatch who indicated that the vehicle she had now stopped was registered to Mr. Rowat. She then exited her vehicle and approached Mr. Rowat's vehicle. There was nothing untoward or remarkable about Mr. Rowat or this event. He produced his licence which was valid although his insurance and registration had expired. She returned to her car and wrote up tickets for speeding, no insurance, and no registration. She made no other relevant observations of Mr. Rowat. In particular, Cst. Jury testified that she did not note any indicia of impairment. Upon her return to Mr. Rowat's car he rolled down the car window at which point Cst. Jury claims to have smelled alcohol. When asked if he had been drinking Mr. Rowat indicated that he had had one beer. With that, Cst. Jury made a demand for an Approved Screening Device ("ASD") with which Mr. Rowat complied. He registered a "fail". He was then placed under arrest for impaired driving and put in the back of the officer's cruiser. Cst. Jury then searched Mr. Rowat's vehicle under the seats, in the consul between the

seats, and in a side pocket. The search produced three cell phones, small packages containing a white powder, and Mr. Rowat's wallet. She did not recall whether she had searched Mr. Rowat personally incident to his arrest. Mr. Rowat was taken to the police station and charged with impaired driving, over 80 msg/%, and possession of cocaine for the purposes of trafficking. At the station he obtained blood alcohol readings of 130 msg/% and 110 msg/%.

[4] The entirety of this process was not captured on the 'Watch Guard' audio-visual camera system that is normally activated either manually or automatically with the emergency lights and siren. Cst. Jury is uncertain as to why this system did not engage but later discovered that the particular device employed had not been operative between January 16 and February 2, 2017. This failure was contrary to very clear mandatory police policy.

[5] At the outset of the trial the Court heard Cst. Jury's evidence for the purpose of determining whether *Charter* breaches had occurred and if so the appropriate remedy. This evidence was given within the ambit of a *voir dire*.

[6] I will first deal with the section 9 issue about the legality of the stop of Mr. Rowat's car. The car was stopped because the officer had a subjective belief that the driver of the vehicle was to be issued a ticket for speeding. In respect of that offence, the evidence-gathering at the point of the stopping was complete, in that nothing further could assist in determining either the speed of the car or the speed limit on the section of road through which the car had passed. On this point, however, it cannot be said that the officer's grounds were objectively reasonable. It is clear that there was no basis to

issue a speeding ticket based on her observations of Mr. Rowat's driving. She could not articulate any basis for connecting the vehicle earlier observed with Mr. Rowat's vehicle other than that it was the only vehicle she could find.

[7] It was argued that the *Motor Vehicles Act*, RSY 2002, c. 153, and in particular s.106, permits an officer to perform traffic checks and that this ability to perform 'random stops' provided a legal basis for the officer stopping Mr. Rowat's vehicle as she did. Counsel provided a variety of case law which was of assistance. It is recognized that the preventative practice of random stops to ensure motor vehicle safety and driver sobriety have been determined to be constitutionally valid.

[8] I am of the view, however, that Cst. Jury's stop was not random. As noted by Cory J. in *R. v. Wilson*, [1990] 1 S.C.R. 1291, "...where the police offer grounds for stopping a motorist that are reasonable and can be clearly expressed... the stop should not be regarded as random".

[9] The ability to stop vehicles on a random basis for general highway safety purposes is not consistent with the officer's clearly stated purpose and cannot be used to bolster, support or substitute for the true purpose of her stop; that being the finding of a vehicle that had been speeding at an earlier point in time. Given the officer's articulated purpose, I am of the view that there was no rational basis for stopping Mr. Rowat's car. It would be disingenuous in the extreme to claim, after the fact, that the purpose in stopping Mr. Rowat was not really as originally stated - the investigation of a previously committed MVA offence - but rather a random motor vehicle safety check. The stopping of Mr. Rowat was not objectively reasonable as there was nothing wrong

with his driving at the time he was stopped and Cst. Jury was not claiming to be out conducting random safety checks. The suspicion that Mr. Rowat was the driver of the vehicle previously observed by Cst. Jury could not rationally be elevated to objectively reasonable grounds for the stop. Further, there was nothing that stopping Mr. Rowat's vehicle could have done to further an investigation into a speeding offence. The stop was, to my mind, arbitrary and violated s. 9 of the *Charter*.

[10] While it cannot be clearly found that the officer was operating in bad faith, the stop was not made with objectively reasonable grounds. Ultimately, the impact upon the accused, while not egregious, was not trivial. There is a societal interest in keeping the streets safe and investigating *Motor Vehicles Act* breaches but these investigations must be for rational and clearly articulated purposes. Here, the officer's stated purpose and subsequent stopping of Mr. Rowat did not comport with the requirement that it be objectively reasonable. The appropriate remedy is the exclusion of the evidence flowing from the arbitrary stop.

SCHNEIDER T.C.J.