Citation: *R.* v. *Loewen*, 2009 YKTC 94

Date: 20090812
Docket: 09-11005A
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

REGINA

v.
DEREK WADE LOEWEN

Appearances:
Jennifer Grandy — Counsel for Crown
Edward Horembala, Q.C. — Counsel for Defence

RULING ON VOIR DIRE
RE SUFFICIENCY OF DEMAND FOR BREATH SAMPLE

[1] LILLES T.C.J. (Oral): We are dealing with the matter of Derek Wade Loewen. He has been charged that on or about the 23rd day of May, 2009, at or near Dawson City, Yukon Territory, did unlawfully commit an offence that he, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, did operate a motor vehicle contrary to s. 253(1)(b) of the *Criminal Code*.

[2] As requested by counsel, I conducted a *voir dire* with respect to the admissibility of the evidence of Constable Hutton as it related to the demand he made for a sample of breath for analysis in an approved screening device pursuant to s. 254(2) of the

Criminal Code. The brief decision I am going to give at this time will only deal with the initial question that counsel asked me to address, whether the constable had reasonable grounds to make the screening device demand. After I give my ruling with regard to the sufficiency of the demand, it may be necessary to hear arguments from counsel on the admissibility of the results of that demand and subsequent breath analysis performed at the police detachment.

[3] Constable Hutton indicated that on May 23, 2009, he was on duty, patrolling in the City of Dawson on a shift that ran from 6:00 p.m. to 3:00 a.m. At around one o'clock in the morning he made a traffic stop. He was travelling north on Fifth Avenue, on patrol looking for offences contrary to the *Criminal Code* and the *Liquor Act*. He said he was travelling about 40 kilometres an hour. He observed a vehicle coming towards him travelling south on Fifth Avenue. He was not certain how fast that vehicle was travelling as he observed it turn right into the back lot of Diamond Tooth Gertie's. The vehicle then backed up into the constable's lane of traffic and proceeded to move forward. Constable Hutton said he had to apply his brakes to slow down his vehicle because of the driving of Mr. Loewen. There was no suggestion by him that he had to apply his brakes suddenly. He did not indicate how close he was to the vehicle.

[4] When Mr. Loewen's vehicle proceeded forward, he observed a large cloud of smoke from the exhaust and the vehicle fishtailing, indicating a rapid acceleration. The officer engaged his emergency lights. The vehicle continued north on Fifth. It was apparent to Constable Hutton that the driver, Mr. Loewen, had not seen the police vehicle with its lights on. Mr. Loewen turned right on King Street, and at that point Constable Hutton turned on his other emergency equipment, including the siren, and

stopped the vehicle. It is apparent that the distances involved were quite short.

[5] Mr. Loewen was the driver. Constable Hutton decided to make a screening demand pursuant to s. 254(2) of the *Criminal Code*. That section states, in part:

> If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel … the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol …

The relevant paragraph is (b), which states:

> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[6] Constable Hutton made certain observations before he made an informal demand of Mr. Loewen to accompany him to his police cruiser for the purpose of providing a screening sample. He decided to ask Mr. Loewen to provide the screening sample because of the driving pattern he had observed that included Mr. Loewen turning around and backing out in front of the police vehicle causing it to slow down. The constable also observed Loewen's vehicle accelerating quickly. He apparently did not notice the police vehicle immediately when the constable put its lights on. When he did pull Mr. Loewen over and he stopped, Constable Hutton observed "glossy" eyes - not glassy, but glossy eyes - and a kind of blank stare. At one point he said that the individual was looking through him with a blank stare. These observations were made in lighting conditions that were less than ideal, perhaps best described as "dusky",

consistent with Dawson City early morning lighting in the spring time. These were the only factors considered by Constable Hutton in making the screening demand pursuant to s. 254(2)(b) of the *Criminal Code*.

[7] I think both counsel would agree that the observations were limited in scope and somewhat different from the ones commonly testified to by the police in these kinds of cases. Mr. Horembala, for the defence, pointed out that the driving as described was not consistent with alcohol consumption alone: it was equally consistent with minor inadvertence. I agree with this submission. The observation of the "glossy" eyes was important to the officer, but he also admitted that there could be other reasons for that condition, including allergy symptoms. The "blank stare", not looking directly at the officer, not making eye contact or apparently "looking through the officer" (whatever that means), may be unusual behaviour in some cultures, but not necessarily in aboriginal culture. It is not an observation that I have heard described in connection with drinking and driving cases in the Yukon. No expert evidence was called with respect to the importance of these observations, and Constable Hutton's own experience as a recent graduate from depot and on his first posting is obviously limited.

[8] Mr. Horembala also points out that it is important to note what was not in evidence. Mr. Loewen was asked if he had been drinking and he indicated to the officer he had not been drinking. The officer did not detect any odour of alcohol coming from the vehicle, from the person of Mr. Loewen, his clothes or his breath. There was no indication that Mr. Loewen was fumbling with his wallet or other papers when the demand was made of him to provide driving particulars. There was no odour of alcohol; there was no slurred speech; there was no fumbling of the wallet, no slurring of speech,

no observed lack of coordination or fine motor skills and no red eyes or other symptoms commonly associated with excessive alcohol consumption. The officer did not conduct any roadside sobriety tests.

[9] Crown counsel made available to the Court the decision of *R.* v. *Barry*, [2009] N.J. No. 193, a decision of the Provincial Court in Newfoundland and Labrador. Quoting from para. 24:

> In the case of roadside screen, a demand for a breath sample need not be based on reasonable and probable grounds but neither can it be entirely arbitrary. The standard is a reasonable suspicion; more precisely, that the peace officer reasonably suspects that the accused has alcohol in his body. It is something less than reasonable and probable grounds but still must have an evidentiary foundation. As with reasonable and probable grounds, the suspicion must meet both a subjective and objective test, that is that the suspicion must be honestly believed by the officer and that belief must be objectively sustainable having regard to the facts known to the officer at the time.

[10] The test, obviously, is not a demanding or high level test. There must only be a reasonable suspicion that there is alcohol in the accused's body. A mere suspicion that the driver has had something to drink is insufficient to justify a demand to provide a screening sample.

[11] I am satisfied that Constable Hutton subjectively believed that Mr. Loewen had alcohol in his body. He was not trying to mislead the Court. On several occasions he indicated to the Court that he did not remember, could not remember, or could not be sure. At other times he felt fairly comfortable in saying this is what happened. On the other hand, I am not satisfied that there was an evidentiary foundation for that belief. In fact, the objective evidence falls woefully short of establishing a basis for a reasonable

suspicion that Loewen had alcohol in his body at the time of driving. I would go so far as to say there was no evidence at all indicating that Loewen had alcohol in his body.

[12] My conclusion then, on the first part of this *voir dire*, is that the objective foundation for a demand for a screening sample has not been met.

[13] As I mentioned to counsel during their submissions, I believe that Constable Hutton was acting in good faith, not in the legal sense of that phrase, but meaning that he was acting honestly and was not attempting to deceive the court. Good faith has been the subject of judicial comment and discussion, and can be an important factor in considering *Charter* relief pursuant to s. 24(2). In light of my finding and the Crown's position with respect to the admissibility of the results of the screening demand, it would be helpful to review the meaning of "good faith" as defined by the courts.

[14] The BC Court of Appeal in *R. v. Washington*, 2007 BCCA 540, notes at para. 78, that the concept of good faith is not fully defined in the jurisprudence. However, the court mentions the Supreme Court of Canada decision *R. v. Kokesch*, [1990] 3 S.C.R. 3, where Justice Sopinka discusses good faith. *Washington* held that Justice Sopinka,

> seemed to accept that "good faith" is a state of mind, an honestly held belief, but he also found that to constitute good faith the belief must be reasonably based. The evidence in *Kokesch* established that the police officers were mistaken about their authority to trespass on a homeowner's property. Either the police knew they were trespassing or they ought to have known. In either case, they cannot be said to have proceeded in good faith.

[15] The Court in *Washington* summarized good faith as "an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute

good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong" (para. 79).

[16] Additionally, Rowles J., in a dissenting opinion, provides at para. 117:

> When engaging in an analysis of "good faith", it is also important to clarify its meaning within the context of s. 24(2). It is a term of art that has been used to describe whether the authorities knew or ought to have known that their conduct was not in compliance with the law (see Sopinka at s. 9.116; *R*. v. *Silveira*, [1995] 2 S.C.R. 297, 23 O.R. (3d) 256 at para. 65; *R*. v. *Wise*, [1992] 1 S.C.R. 527, 133 N.R. 161 at para. 97; *R*. v. *Kokesch*, [1990] 3 S.C.R. 3, 121 N.R. 161 at para. 52). Therefore, an inquiry into good faith examines not only the police officer's subjective belief that he or she was acting within the scope of his or her authority, but it also questions whether this belief was objectively reasonable.

[17] In the Supreme Court of Canada decision of *R. v. Buhay*, 2003 SCC 30, the Court notes, at para. 59, "good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority". The case involved the police search of a locker in a bus station that had been rented and locked by an individual. A warrant was not obtained prior to the locker search. The evidence was excluded. The Court determined that the officers' perception that the individual's privacy rights had been "given up" when they smelled marijuana in the locker was not a reasonable belief because the locker had been rented for private use and was locked. The accused had a right to privacy.

[18] The Court also noted that one police officer did not even think of obtaining a warrant prior to searching the locker and the other police officer did not consider a warrant because he thought he lacked sufficient grounds to obtain one. The police

officer's "thought that there were insufficient grounds to obtain a warrant can properly be viewed as fatal to a claim of good faith…the officer made the choice to avoid the legal requirement of obtaining a warrant even on his own assumption that one might be required" (para. 61).

[19] In summary, it seems that a finding of good faith cannot be held in one of two circumstances:

> 1- an officer subjectively believed their conduct to be in violation of the *Charter* (in which case this would be bad faith), or;
> 2- an officer subjectively believed their conduct to be within the scope of their authority but this belief cannot be objectively sustained

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LILLES T.C.J.