Citation: *R. v. Gaven*, 2019 YKTC 46

Date: 20191015
Docket: 18-11010
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

REID RUTHERFORD GAVEN

Appearances:
Leo Lane — Counsel for the Crown
Timothy Foster — Counsel for the Defence

REASONS FOR JUDGMENT

Introduction

[1] Reid Gaven is charged that on July 28, 2018 he failed or refused, without reasonable excuse, to comply with an approved screening device ("ASD") demand contrary to s. 254(5) of the *Criminal Code*.

Summary of the relevant evidence

[2] At approximately 12:45 a.m., the investigating officer, Cpl. Warren, momentarily heard and observed a loud truck in the downtown area of Dawson. Soon thereafter, he located the vehicle stopped on the corner of Queen Street and Eighth Avenue. The vehicle was still running, but Cpl. Warren learned that it had stopped due to a

mechanical failure. The officer spoke to Mr. Gaven about the vehicle and the possibility of having it towed.

[3] As Cpl. Warren and Mr. Gaven discussed towing options for the truck, the officer received information via his police radio that there had recently been a hit and run involving an unattended vehicle and a truck, and that the truck was at the top of Eighth Avenue where he and Mr. Gaven were speaking.

[4] Cpl. Warren advised Mr. Gaven that he believed this information that had come over the police radio was in reference to him. He requested and received Mr. Gaven's driver's licence.

[5] The officer ultimately made an ASD demand based on the report of a hit and run, some slurring of Mr. Gaven's speech, and Mr. Gaven's admission that he had consumed some alcohol.

[6] Mr. Gaven advised the officer that he did not have to blow into the device. He also indicated that he could not blow because his chest hurt. Further, he mentioned, on more than one occasion, that he wished to deal with another officer. He did not indicate why. Cpl. Warren explained to Mr. Gaven the jeopardy that he would face if he did not provide a sample.

[7] By way of a backdrop to this interaction, Mr. Gaven and Cpl. Warren had spoken by phone approximately a month previously with respect to a complaint regarding the reckless manner in which a motorcycle had been driven in the downtown area of Dawson. Mr. Gaven testified that the officer had lied to him about what

evidence the officer had regarding the allegation. He also recalled the officer saying that he would get him. Although Cpl. Warren did not recall much of this conversation, he admitted that he had mentioned having a video of Mr. Gaven, even though this was inaccurate. Also, he thought he had said something to the effect that if Mr. Gaven kept doing such things, the police would catch him.

[8] On July 28, after the officer readied the ASD and presented the device to Mr. Gaven by holding it close to his mouth, Mr. Gaven kept his lips together and looked past the officer. Cpl. Warren deemed this non-responsiveness to be a refusal to blow into the device. He arrested Mr. Gaven and provided him with his rights.

Position of the parties

[9] Mr. Gaven submits that the whole of Cpl. Warren's evidence reveals its unreliability and that the Court should be concerned about all aspects of the investigation, from the officer's grounds to the wording and timing of the ASD demand to whether or not Mr. Gaven committed the *actus reus* of refusal.

[10] If the Court finds that these initial arguments fail, Mr. Gaven argues that he has established on a balance of probabilities that he had a reasonable excuse for refusing based on the prior history between him and this officer.

[11] The Crown replies that there is ample evidence to establish that Cpl. Warren had grounds for the demand, that it is clear that Mr. Gaven understood the demand, and that the refusal was unequivocal. The Crown further submits that Mr. Gaven's actions reveal that he was not afraid of the investigating officer, and that in any event,

even if he has established a subjective fear, that fear does not amount to a reasonable excuse.

Analysis

[12] Firstly, I will consider the argument that the investigating officer's evidence is unreliable and taints the investigation of Mr. Gaven.

[13] I accept that the evidence of Cpl. Warren might have been presented in a more concise and straightforward manner. I also find that he made mistakes in note keeping and testifying, for example, the route that he followed to catch up to Mr. Gaven, and whether he read the approved screening device demand or made it by memory. That being said, much of his evidence is corroborated by the defendant.

Grounds for the ASD demand

[14] Cpl. Warren did not initially testify to a series of events that would have established a reasonable suspicion that the driver, Mr. Gaven, had alcohol in his body. However, during his testimony he revisited the sequence of events prior to his making the demand and included the fact that the defendant admitted to having consumed two drinks of alcohol. Also, as fairly conceded by the defence, Mr. Gaven agreed in his testimony that prior to the demand the officer asked and he admitted to drinking alcohol.

[15] I find that the officer had the requisite grounds to make the demand.

Timing of the ASD demand

[16] An officer who has reasonable grounds to suspect that a driver has alcohol in their body may demand that the driver provide forthwith a breath sample into an ASD. The defence questions whether Cpl. Warren established that the demand was made forthwith.

[17] The question of whether a demand for an ASD breath sample is made forthwith is normally dealt with by way of a *Charter* application to exclude evidence (see, for example, *R. v. Latour,* [1997] 34 O.R. (3d) 150 (C.A.); *R. v. Torsney*, 2007 ONCA 67, affirmed [2007] S.C.C.A. No. 126; *R. v. Yamka*, 2011 ONSC 405; and *R. v. Mohammed*, 2013 ONSC 1031). No *Charter* application has been filed in the matter before me. Nonetheless, I must consider whether the "forthwith" requirement has been met.

[18] The Supreme Court of Canada in *R. v. Woods*, 2005 SCC 42, recognized the requirement of immediacy in a s. 254(2) demand:

> …Section 254(2) depends for its constitutional validity on its implicit and explicit requirements of immediacy. This immediacy requirement is implicit as regards the police demand for a breath sample, and explicit as to the mandatory response: the driver must provide a breath sample "forthwith". [para. 14]

[19] The Court found that providing a breath sample into an ASD more than one hour after being arrested for refusal was not "forthwith". The Court noted that:

> It is true, as I mentioned earlier, that "forthwith", in the context of s. 254(2) of the *Criminal Code*, may in unusual circumstances be given a more flexible interpretation than its ordinary meaning strictly suggests. For

> example, a brief and unavoidable delay of 15 minutes can thus be justified when this is in accordance with the exigencies of the use of the equipment: see *Bernshaw*. [para. 43]

[20] Courts have acknowledged that a consideration of the circumstances of each case is of importance. The Ontario Court of Appeal in *R. v. Quanash*, 2012 ONCA 123 stated:

> In my respectful opinion, articulation of the precise linguistic equivalent for "forthwith" is less important than a careful consideration of all the circumstances of the particular case. … [para. 52]

[21] In the matter before me, Cpl. Warren testified that he commenced his interaction with Mr. Gaven at approximately 12:46 a.m. It is important to note that at this point in time, he was not investigating Mr. Gaven, but instead seeing if he could assist him with his broken down vehicle. They conversed for approximately five minutes before Cpl. Warren learned of a possible hit and run involving Mr. Gaven. The officer asked Mr. Gaven for his driver's licence in order that he might ascertain his identity. Having done so, the officer asked Mr. Gaven to approach his police vehicle. He asked the defendant if he had consumed any alcohol and received an affirmative response. Cpl. Warren testified that he read the ASD demand "right after bringing [Mr. Gaven] to the vehicle", which was at approximately 1:00 a.m.

[22] The defence submits that there is a period of time unaccounted for after the initial discussion with respect to Mr. Gaven's disabled vehicle. However, when the officer moved from assistance mode to investigative mode, he described the steps he took leading to the demand and the timeframe after the demand until the refusal. Although he could have more clearly described the period of time after making the

demand, I understood his evidence to be that he read the demand, explained the process of providing a sample and the consequences of a refusal before presenting the device to the defendant.

[23] There is no evidence of any intervening event that interrupted the investigation. I accept the officer's evidence that he made the demand after learning that the defendant had consumed alcohol. I also accept his evidence that he attempted to administer the test once he had made the demand.

[24] In the result, I find that the officer made the demand to Mr. Gaven once he had the requisite grounds, and that he provided the defendant the opportunity to perform the test forthwith.

Wording and validity of the ASD demand

[25] The defence takes issue with the wording of the demand, as Cpl. Warren had suggested in his reports that he had read the demand, whereas in his testimony it became clear that he had given the demand to Mr. Gaven by memory.

[26] The law is clear that the precise words of a breath demand do not have to be proved as long as the person receiving the demand understands what is being requested. In *Torsney*, the Court stated at para. 6:

> We agree with the summary conviction appeal judge that the missing word "forthwith" did not render the demand invalid. The demand need not be in any particular form, provided it is made clear to the driver that he or she is required to give a sample of his or her breath forthwith.[2] This can be accomplished through words or conduct, including the "tenor [of the officer's] discussion with the accused". See *R. v. Horvath*, [1992] B.C.J. No. 1107 (B.C.S.C.) (A.D.). What is crucial is that the words used be

> sufficient to convey to the detainee the nature of the demand. See *R. v. Ackerman* (1972), 6 C.C.C. (2d) 425 at 427 (Sask. C.A.) and *R. v. Flegel* (1972), 7 C.C.C. (2d) 55 at 57 (Sask. C.A.).

[27] As indicated, the officer should have been more careful in the making of his reports and in his testimony with respect to how he presented the demand to Mr. Gaven. He made a mistake in the writing of his report, by indicating that he had read the demand, when, in fact he had made it from memory; pointed out the mistake to counsel just prior to trial; and then reinforced his mistake during his testimony. However, I do not find that he attempted to mislead the Court. At the end of the day, it was clear that he had made the demand from memory, even though he used the term "read from memory".

[28] Also, Mr. Gaven testified that he understood that the officer made a demand that he provide a breath sample into the ASD immediately. The officer then held the device in front of Mr. Gaven's face. Mr. Gaven agreed that it was clear that the officer wanted him to blow into the device.

[29] I find that Cpl. Warren's demand to Mr. Gaven was valid.

***Actus reus* of refusal**

[30] Mr. Gaven did not verbally refuse to provide a breath sample. However, when he was asked to provide a sample, he stated that he did not have to blow and that he wanted another officer there. He also stated that he could not provide a sample because his chest hurt. The officer explained to Mr. Gaven that he was required to blow and that if he did not he would be charged with refusal. He held the ASD device

up to Mr. Gaven's mouth area. Mr. Gaven did not move and did not say anything. Cpl. Warren testified that Mr. Gaven kept his lips tight together and looked past the officer and the device. The officer was unable to say for how long he held the device in front of Mr. Gaven's face, but that there came a point when he believed it was an unequivocal refusal.

[31] Also, during cross-examination of Mr. Gaven, the following exchange occurred:

> Q. And he was asking – he was telling you to do something that you clearly were not going to do; right?
>
> A. M'hmm.
>
> Q. Is that right?
>
> A. Yeah.
>
> …
>
> Q. He was a police officer making a demand of you.
>
> A. Yeah
>
> Q. And you were a person asserting your rights –
>
> A. Yeah.
>
> Q. – As a citizen.
>
> A. Yeah.
>
> Q. Is that right?
>
> A. Yeah.

[32] In the result, I find that Mr. Gaven refused to provide a sample.

Reasonable Excuse

[33] The defendant contends that he has established on the balance of probabilities that he had a reasonable excuse to refuse to comply with the ASD demand, based on a previous interaction between him and Cpl. Warren.

[34] In *R. v. Goleski*, 2014 BCCA 80, affirmed 2015 SCC 6, the Court held that a defendant has the persuasive burden "to establish the factual foundation for his asserted reasonable excuse on a balance of probabilities" (para. 81).

[35] A defendant's subjective fear or mistrust of police does not automatically equate to a reasonable excuse. As stated in *R. v. Miller*, (1972) 10 C.C.C. (2d) 467 (B.C. Co.Ct), at para. 17:

> …But it is the Court's judgment that passes on the reasonable quality of the excuse and not that of the person who fails or refuses. He does that at his peril unprotected by the sincerity of his belief.

[36] In *R. v. Foran*, (1985) 32 M.V.R. 269 (B.C. Co. Ct.) the Court stated at para. 23:

> …it is my view of the authorities that unless the conduct of the Police shows malice or threatens some unfairness or illegality, police abuse, falling short of an infringement of a Right granted by the Charter of Rights (and thus permitting an argument under S. 24(2)) does not of itself give an accused a reason to refuse to take the test. It appears that there must be a nexus between the police conduct and the refusal creating an apprehension that the test would not be fairly and appropriately administered. …

[37] Courts have found that mistreatment of accused at the hands of police is sufficient to establish a reasonable excuse to provide a breath sample, as for example, in *R. v. Cristoff*, (1978) 41 C.C.C. (2d) 406 (B.C. Co. Ct.), where a police officer

requested that the defendant take down his pants and underwear and touch his toes, and laughed as the defendant complied with this request.

[38] In the matter before me, the investigating officer and Mr. Gaven had an interaction by phone one month prior to the refusal allegation which Mr. Gaven testified led him to believe that Cpl. Warren would not treat him fairly. It is true that he told Cpl. Warren on July 28 that he did not trust him and that he wanted another officer there. However, he also said that he could not blow into the device because his chest hurt. Despite this latter statement, I find, on balance, that he had a subjective belief that he would not be treated fairly by the officer.

[39] The second question is whether Mr. Gaven's subjective belief was objectively reasonable. Cpl. Warren never followed up with Mr. Gaven following the June telephone conversation. The officer never referred to the motorcycle incident or telephone conversation during their dealings on July 28. Mr. Gaven agreed that the two had a friendly conversation when discussing the disabled truck. He also agreed that at the outset, the officer appeared genuinely interested in helping him get his truck off the road. It was only when the conversation turned to a hit and run investigation that the tenor of the interaction changed. The officer testified that the defendant became "verbally cocky", while Mr. Gaven testified that the officer appeared "aggravated". Mr. Gaven agreed in cross-examination that Cpl. Warren did not threaten him on July 28.

[40] Having objectively considered the facts, even if I accept that the officer told Mr. Gaven during the June telephone conversation about alleged reckless driving that he

was going to get him, I am unable to find a nexus between this conversation and the events of July 28. On the whole of the evidence, there is nothing to suggest that Cpl. Warren treated Mr. Gaven unfairly on July 28, or that he was likely to have done so had the defendant complied with the demand. There is no evidence to cause a reasonable person in Mr. Gaven's situation to believe that the officer would have treated them unfairly.

[41] I find that Mr. Gaven has not established on a balance of probabilities that he had a reasonable excuse for refusing the demand. Accordingly, I find him guilty of the alleged offence.

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CHISHOLM C.J.T.C.