Citation: *R. v. Mortimer*, 2003 YKTC 36 Date: 20030516
Docket: T.C. 02-00285
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**
Before: His Honour Judge Faulkner

R e g i n a

v.

Tyler Rae Mortimer

Appearances:
Kevin Drolet Counsel for Crown
Leigh Gower Counsel for Defence

**REASONS FOR JUDGMENT**

[1] Tyler Rae Mortimer is charged with failing to provide breath samples contrary to s. 254(5) of the *Criminal Code*. In the early hours of July 16, 2002, Corporal Cashen, of the Whitehorse R.C.M.P., was on patrol in downtown Whitehorse. He received a radio call that there had been a complaint of an impaired driver heading from the Riverdale subdivision towards downtown Whitehorse. Corporal Cashen observed a vehicle matching the description he had received and stopped it at 1:15 a.m. Mr. Mortimer was the driver and sole occupant. Mr. Mortimer was asked to produce his driver's licence, registration and proof of insurance, which he did without difficulty. However, Corporal Cashen detected an odour of alcohol on the accused's breath. Corporal Cashen also noted that the accused's eyes were bloodshot and his face was flushed.

[2] Corporal Cashen requested that Mr. Mortimer accompany the officer to the police cruiser. As the accused got out of his vehicle, he managed to strike

himself with the car door as he attempted to close it. Corporal Cashen also noted that the accused's walk was "deliberate" and that he appeared to be somewhat unsteady on his feet. Once the accused was seated in the police car, Corporal Cashen asked the accused if he had consumed any alcohol. Mr. Mortimer replied that he had "a few". In response to a question as to when he had consumed his last drink, the accused replied that it had been half an hour.

[3] At 1:28 a.m., as a result of his observations of the accused, Corporal Cashen read to Mr. Mortimer a demand pursuant to s. 254(2) to provide breath samples for analysis by an approved screening device. The accused complied and the result was a "fail". Corporal Cashen then advised the accused that he was under arrest for impaired driving and read the accused a s. 254(3) demand as well as advising Mr. Mortimer of his right to counsel.

[4] Mr. Mortimer was taken to the police detachment and given the opportunity to consult counsel. He first attempted to contact a lawyer in British Columbia but only succeeded in reaching the lawyer's answering machine. Corporal Cashen then assisted Mr. Mortimer to contact local duty counsel. After the accused had finished speaking to duty counsel, Corporal Cashen asked the accused if he would provide breath samples. The accused refused and maintained his refusal despite three warnings from Corporal Cashen as to the consequences of refusing. As a result, Mr. Mortimer was charged with an offence under s. 254(5).

[5] At trial, Corporal Cashen was the sole witness. The defence elected not to call evidence. Mr. Gower, on behalf of the accused, raised two objections to the charge.

[6] First, he argued that the Crown had failed to prove that the device used by Corporal Cashen to test Mr. Mortimer at the roadside was an "approved screening device". Without such proof, Mr. Gower urged, the result of the test

was inadmissible. Without the test result, Corporal Cashen lacked reasonable grounds to make the s. 254(3) demand. Without the reasonable grounds, the demand was invalid and Mr. Mortimer had a reasonable excuse to refuse it.

[7] Mr. Gower's second submission was that the roadside demand was invalid because it had not been made "forthwith". Mr. Gower argued that 15 minutes had elapsed from the time Mr. Mortimer was stopped and the demand was made. I note that the actual delay was 13 minutes but nothing turns on the two-minute difference. Two consequences were said to flow from the delay. As in the first argument, the delay was said to render the demand invalid and the result inadmissible. Secondly, the detention, not being for the purposes of s. 254(2), required the police to advise the accused of his right to counsel. Since Corporal Cashen had not advised the accused of his right to counsel until later, the conscripted evidence obtained in the intervening period should be excluded pursuant to s. 24(2) of the *Charter*.

[8] I turn to examine the submission that the Crown must prove that the device Corporal Cashen used at the roadside was an approved screening device. It should be noted that there was not a complete absence of evidence on this point. Corporal Cashen variously described the instrument that he used an "approved screening device" or an "A.S.D.". He was not asked, and did not say, which of the several screening devices approved by Regulations made pursuant to s. 254(1) he employed. In this regard, Mr. Gower urged the Court to follow the decision of the Nova Scotia Supreme Court in *R. v. LeBrun*, [1999] N.S.J. No. 288. However, there are other decisions, even from the same jurisdiction, holding that it is not necessary for the Crown to prove that the instrument was an approved device: *R. v. Seymour* (1986), 75 N.S.R. (2d) 174, (S.C. App. Div.) or that it was operating properly: *R. v. Yurechuk*, [1983] 1 W.W.R. 460, (Alta. C.A.). As well, there are numerous decisions holding that, where the roadside demand is refused, it is not necessary to prove that the device that would have been used

was an approved device. See, for example, *R. v. Lemieux* (1990), 41 O.A.C. 326 (C.A.).

[9] So, as far as I am aware, there is no binding decision touching on this point. In my view, the preponderance of the case law and an analysis of the legislative regime both suggest that it is not necessary for the Crown to do more than was done here, where the officer testified that he used an approved screening device. It must be remembered that taking the test and failing it does not constitute a criminal offence. The only purpose of the test is to “screen” motorists believed to have alcohol in their body. Those that fail will warrant further investigation. It is true that the “fail” result on the roadside test may provide part of the grounds for a later demand under s. 254(3), but that is all. For example, evidence of a failed roadside test cannot be used to buttress the accuracy of later breath test results pursuant to the s. 254(3) demand: *R. v. Coutts* (1999), 136 C.C.C. (3d) 225, (Ont. C.A.), nor is passing the roadside test, in and of itself, “evidence to the contrary”: *R. v. Fraser* (1983), 6 C.C.C. (3d) 273, (N.S.C.A.).

[10] The second defence argument touches upon an issue of delay in making a demand to provide a roadside sample. Section 254(2) authorizes such a demand where a person “is operating a motor vehicle or … has the care or control of a motor vehicle…”. Moreover, the demand is to provide the sample “forthwith”. The leading decisions are those of the Supreme Court of Canada in *R. v. Grant*, [1991] 3 S.C.R. 139, *R. v. Bernshaw*, [1995] 1 S.C.R. 254, *R. v. Dewald*, [1996] 1 S.C.R. 68 and the decision of the Ontario Court of Appeal in *R. v. Campbell* (1988), 44 C.C.C. (3d) 502. Essentially, these cases hold that a demand pursuant to s. 254(2) does not have to be made immediately, but is to be made as soon as possible after the motorist is stopped because the citizen is being detained without access to counsel. The words "is" and "has" must have some degree of past signification. Interpreting these words literally as applying only in the present tense could defeat the purpose of the provision and lead to

absurd results. After all, the driver is no longer driving once he is stopped by the police officer, although he might still be said to be in care or control of the vehicle. On the other hand, the time lapse after the actual care and control has ended should be no longer than is reasonably necessary to enable the police officer to carry out his duties under the provision and the demand should be made as soon as is reasonably possible in the circumstances. If there is an indication that the motorist has recently consumed alcohol, it will be permissible to wait until sufficient time has elapsed for an accurate test result to be obtained.

[11] In this case, approximately 13 minutes elapsed from the time the accused was stopped until the demand for a roadside sample was made. There is no indication that Corporal Cashen waited because he thought the accused had recently consumed alcohol. In fact, the accused told him it had been 30 minutes since his last drink. To put the matter another way, there is no evidence that Corporal Cashen delayed making the demand for any reason – there is simply the fact that 13 minutes went by. During this period of time, Corporal Cashen described asking for and receiving the accused's documents, requesting the accused to come to the police car and watching the accused alight from his vehicle and make his way to the police car. Once the accused was seated in Corporal Cashen's vehicle, there was a conversation about whether or not the accused had consumed alcohol and when he had his last drink.

[12] Corporal Cashen was not asked if these matters occupied the entire 13 minutes, or, if they did, whether he could have proceeded more quickly with his investigation. On the state of the evidence, I am driven to conclude that there has not been a delay in making the demand such that the demand was unlawful. Nothing that Corporal Cashen did strikes me as unreasonable or unnecessary. There was nothing that occurred which, more properly, should have been delayed until after the demand for a roadside sample was made. In my view, the investigation proceeded with reasonable dispatch.

[13] Accordingly, I find that the s. 254(2) demand was lawfully made and that the result of the test carried out in consequence of that demand is admissible as part of the Corporal's grounds for then making the s. 254(3) demand.

[14] If I am wrong in this conclusion, I further find that the constellation of physical symptoms observed by Corporal Cashen would have been sufficient for him to make a demand pursuant to s. 254(3) even if the result of the roadside test was to be ignored. Similarly, should there have been any breach of the accused's s. 10(b) rights at the roadside, such that the approved screening device result should be excluded, there nevertheless remains a sufficient basis for the s. 254(3) demand. Moreover, any such defect in advising the accused of his rights would not extend past the initial dealings at the roadside. After the roadside test, the accused was properly advised of his rights and afforded an opportunity to exercise those rights.

[15] In the result, I find that there was a lawful demand put to the accused pursuant to s. 254(3) of the *Criminal Code* and that the accused failed to comply with that demand. No reasonable excuse has been put forward to excuse the failure. Accordingly, I find the accused guilty as charged.

Faulkner T.C.J.