Citation: *R. v. Sidney*, 2018 YKTC 37

Date: 20180928
Docket: 18-00030
Registry: Whitehorse

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

REGINA

v.

JAYDEN AMERY SIDNEY

Appearances:
Christiana Lavidas — Counsel for the Crown
Amy Steele — Counsel for the Defence

**RULING ON *VOIR DIRE***

[1] Mr. Jayden Sidney faces charges of failing or refusing to comply with a demand to provide a breath sample into an approved screening device ("ASD"), driving while prohibited and breaching conditions of a probation order. The alleged offences occurred in the City of Whitehorse, Yukon on April 14, 2018.

[2] The defence alleges breaches of Mr. Sidney's *Charter* rights pursuant to sections 8 and 9.

[3] Pursuant to section 24(2) of the *Charter*, the defence seeks exclusion of all evidence obtained after Mr. Sidney's detention in relation to an ASD demand.

[4] The two investigating officers testified in this *voir dire* for the Crown. The defence called no evidence.

*Summary of relevant facts*

[5] On the evening of April 14, 2018 Constables Breton and Conway were advised by dispatch that a member of the public had complained about a group of individuals who had been "drinking" in the 202 lounge in Whitehorse. According to the complaint, the group had left the premises in a Dodge Dart for which the licence number was provided. The officers learned that the suspect vehicle was travelling on the Robert Service Way thoroughfare, in the direction of the Alaska Highway.

[6] As a result of this initial information, the two officers, who were in the process of leaving the Whitehorse detachment, proceeded in the direction of the suspect vehicle in an attempt to locate it. A further report relayed to the officers included information of bad driving with respect to the suspect vehicle.

[7] Further information indicated that the suspect vehicle had turned right onto the Alaska Highway and was thus headed in a northerly direction. As the officers turned onto the highway, they noted a vehicle in the distance. Cst. Conway increased his speed in order to close the distance with the vehicle that had been observed. The police followed the vehicle for approximately two minutes. During this time, the vehicle swerved quickly once towards the right hand shoulder before returning to the proper lane of travel.

[8] When the police confirmed that the vehicle matched the description of the complaint, the officers initiated a traffic stop by activating the emergency lights. The driver of the vehicle responded immediately by pulling to the side of the road.

[9] When Cst. Breton approached the driver's side door, he noted that the male driver was smoking a cigarette. Upon request, the driver, who identified himself as Jay Smarch, advised that he did not have his driver's license with him. Cst. Breton was suspicious of the name provided by the driver, as he believed the driver hesitated briefly before providing this information. There were three passengers in the vehicle.

[10] Cst. Breton testified that when asked by him, the driver denied that he had consumed alcohol. Cst. Breton was unable to smell an odour of liquor, although he did testify that it was a windy night.

[11] The second officer, Cst. Conway attended to the passenger side of the suspect vehicle. He advised Cst. Breton that he observed open liquor within the vehicle, without specifying where.

[12] At this point, Cst. Breton asked the driver to exit the vehicle for the purposes of an ASD demand, as he believed he had a reasonable suspicion that the driver had alcohol in his body. Cst. Breton explained that his reasonable suspicion flowed from the following factors:

- The initial complaint of a group of people leaving a licensed establishment in a vehicle;
- The subsequent anonymous information of bad driving;

- The quick or sharp swerve to the right that he had observed;
- The open liquor of which he was advised;
- His suspicion that the driver had provided a false name;
- The driver's nervous demeanour;
- The soft manner in which the driver spoke, which the officer viewed as an attempt to prevent the officer from smelling his breath.

[13] After advising the driver that he suspected he had consumed alcohol, and that he "needed a sample of his breath", Cst. Breton had the driver accompany him to the police vehicle. As Cst. Breton did not have the training to operate the screening device, he requested that Cst. Conway make a demand and obtain a sample.

[14] The police handcuffed the driver before placing him in the back of the police vehicle for the purposes of an ASD test. Cst. Conway testified that he formally read the ASD demand from his card to Mr. Sidney, whom the police had now identified.

[15] He indicated that Mr. Sidney asked to speak to a lawyer on two occasions, but that he explained to him that he did not have the right to speak to a lawyer with respect to an ASD demand. Mr. Sidney indicated he would not provide a breath sample into the screening device.

[16] In his testimony, Cst. Conway did not specifically articulate his grounds for making the demand. He agreed that he had not smelled alcohol on Mr. Sidney's breath, nor had he noticed any issues with respect to his balance or coordination.

[17] Based on the refusal to provide a sample, Cst. Breton arrested Mr. Sidney. Cst. Breton subsequently read Mr. Sidney his *Charter* rights. After doing so, he read the

breathalyzer demand to Mr. Sidney in error. After having being read this demand, Mr. Sidney agreed to provide a breathalyzer sample, but because he had already been arrested for failing to provide a breath sample into the ASD, the police did not ultimately provide him an opportunity.

**Analysis**

*Reasonable suspicion*

[18] Section 254(2)(b) of the *Criminal Code* provides that a peace officer who has reasonable grounds to suspect that a person has alcohol in their body and has operated a motor vehicle in the preceding three hours, may require the person to comply with an approved screening device demand.

[19] The decision in *R. v. Loewen*, 2009 YKTC 116, considered the requirements for making a demand:

> [6] The test, obviously, is not a demanding or high level one. There must only be a reasonable suspicion that there is alcohol in the accused's body. A mere suspicion without a reasonable evidentiary basis or a hunch that the driver has had something to drink is insufficient to justify a demand to provide a screening sample.

[20] As stated in *R. v. Chehil*, 2013 SCC 49:

> [26] Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, Binnie J. provided the following definition of reasonable suspicion, at para. 75:
>
> > The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case.

> "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

[21] In *Schroeder v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 2366, the Court stated:

> [14] It is the consumption of alcohol alone that provides grounds for the demand, not its amount or behavioural consequence...All that the officer requires is a reasonable suspicion that the person operating the vehicle had alcohol in their body. The officer does not have to believe that the accused has committed any offence. …

[22] In fact, the Ontario Court of Appeal has found that it is not a precondition to a valid screening device demand that the driver have the odour of an alcoholic beverage on his or her breath (see, for example, *R. v. Zoravkocic* (1988), 112 O.A.C. 119 (ONCA), and *R. v. Hryniewicz*, [2000] O.J. No. 436 (ONCA)).

[23] In *Hryniewicz*, the trial judge considered the glazed and bloodshot eyes of the driver, his slurred speech, and his comment that he "[h]ad a couple" in coming to a determination that the investigating officer had a reasonable suspicion.

*The approved screening device demand*

[24] As indicated, Section 254(2) of the *Code* requires the officer making the demand to have formed the reasonable suspicion that the driver has alcohol in his body. As noted, Cst. Breton testified that he reasonably suspected that Mr. Sidney had alcohol in his body based on a number of factors. However, the officer agreed that he had not described some of these factors in his notes or subsequent reports, namely Mr.Sidney's

nervous demeanour and the soft manner in which he spoke, which the officer testified may have been an attempt to conceal his breath from the officer. Due to this information only being mentioned for the first time at trial, I place little weight on it. In any event, these observations and sentiments are, at best, equivocal. The suggestion that Mr. Sidney was speaking softly in order to mask a smell of alcohol on his breath is conjecture. Also, apparent nervousness in the presence of police is not necessarily associated with the consumption of alcohol.

[25] Prior to the traffic stop, Cst. Breton possessed information related by a third party that a group of individuals had departed a bar in a motor vehicle – the description and licence plate number of which were provided; and that the operation of the vehicle included bad driving. This information was clearly sufficient to initiate a traffic stop. Also, an officer is entitled to rely on such hearsay information in assessing whether there are objective facts that give rise to a reasonable suspicion (*R. v. Bush*, 2010 ONCA 554 at para. 61).

[26] In the process of following the vehicle, Cst. Breton observed a sharp or quick movement to the right side of the road, after which the vehicle continued in its lane. The driver pulled the vehicle over in an appropriate fashion when the officer activated his emergency lights. In addition to the driver, there were three passengers, one in the front seat and two in the rear. As Cst. Breton spoke to the driver of the vehicle, his colleague, Cst. Conway, who was standing on the passenger side of the stopped vehicle, advised him that he saw open liquor in the vehicle.

[27] In my view, the totality of this information does not objectively meet the threshold of reasonable suspicion that the driver, Mr. Sidney, had alcohol in his body while operating the motor vehicle.

[28] The investigating officer made no observations of Mr. Sidney that could have objectively elevated his belief to one of reasonable suspicion. For example, Mr. Sidney displayed no difficulty with respect to coordination, balance or speech, and as noted, there was no smell of alcohol emanating from him.

[29] It is also of interest to note that pursuant to s. 254(2), the peace officer who makes the approved screening device demand must also form the opinion that a sufficient sample was provided (see *R. v. Shea* (1979), 49 C.C.C. (2d) 497 (P.E.I.S.C.), at para. 12). This, however, does not oblige the officer who ultimately administers the test to have also formed the reasonable suspicion (*R. v. Padavattan* (2007), 223 C.C.C. (3d) 221 (O.N.S.C.) at para. 17).

[30] In the matter before me, after Cst. Breton's informal demand, he requested Cst. Conway to "perform the demand" and to "get a sample". This led to the apparently unusual procedure of both investigating officers individually making a demand of Mr. Sidney. Logically then, both officers should have formed the reasonable suspicion necessary to make a demand.

[31] In his testimony, Cst. Conway did not explicitly articulate his grounds for making the demand. Nonetheless, it is clear that he did possess some of the same information to which Cst. Breton had testified. There is no indication, however, that he had

additional information to that of Cst. Breton, and, as such, he did not have the requisite objective reasonable grounds to make the demand.

[32] In the result, I find that the police breached Mr. Sidney's s. 8 and s. 9 *Charter* rights by detaining him, in handcuffs, in the police vehicle and by attempting to have him provide samples of his breath.

*Whether the evidence flowing from the breaches is admissible*

[33] It is well established that a court must assess and balance three factors in deciding, pursuant to s. 24(2) of the *Charter*, whether the admission of evidence, in all the circumstances, would bring the admission of justice into disrepute (*R*. v. *Grant*, 2009 SCC 32). The factors are:

- the seriousness of the breach;
- the impact of the breach on the *Charter*-protected interests of Mr. Sidney; and
- society's interest on an adjudication of the case on its merits.

[34] As discussed in *Grant*, it is important to remember that the issue to be determined is whether the overall repute of the justice system will, in the long term, be negatively affected by the admission of the evidence (para. 68).

[35] In the matter before me, the police arbitrarily detained an 18-year-old individual without conducting a sufficient investigation. The necessary additional steps to make a proper assessment would not have been time-consuming or onerous.

[36] Additionally, for the purposes of having him submit to a screening device to determine whether there was alcohol in his body, they handcuffed him and placed him in the back of the police vehicle. Cst. Conway testified that the officers used handcuffs because Mr. Sidney was being verbally aggressive. There was no indication that the officers were in physical danger. It must be remembered that Mr. Sidney was not under arrest at this time; in fact he was unlawfully detained at the time. While I appreciate that in *Grant* it was observed that the state conduct in obtaining breath samples is "relatively non-intrusive", in my view, the facts of this case resulted in relatively serious breaches.

[37] In terms of the impact of the breaches on Mr. Sidney's *Charter*-protected interests, this process ultimately triggered his arrest and transportation to the arrest processing unit where, according to the Information, he was housed. Thus, Mr. Sidney's liberty interests were negatively impacted; the arbitrary detention ultimately led to his imprisonment. Although I am mindful of the fact that he was also charged with allegations of breaching two court orders, his arbitrary detention and his failure to comply with an unlawful search affected his liberty interests.

[38] Regarding the third prong of the inquiry, it is clearly in society's interests to have drinking and driving allegations adjudicated on their merits. As the evidence of the refusal is essential to the Crown's case, this factor favours inclusion of the evidence.

[39] Having balanced the three factors, I find that in the overall circumstances of this case the evidence related to the refusal charge should be excluded.

[40] However, I do not come to the same conclusion regarding the other evidence obtained by police. Cst. Breton was suspicious that Mr. Sidney had provided a false

name. He also was unable to provide a driver's licence. The police were entitled to take reasonable investigative steps to determine whether Mr. Sidney had provided accurate information. It took very little time for police to determine that he had not.

[41] The information as to his real identity was easily discoverable and was unrelated to his arbitrary detention. In the result, that evidence is admissible.

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CHISHOLM C.J.T.C.