Citation: *R. v. Davy,* 2024 YKTC 26

Date: 20241018
Docket: 23-00470
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

KELLY DAVY

Appearances:
Leo Lane — Counsel for the Crown
David C. Tarnow — Counsel for the Defence

RULING ON *CHARTER* APPLICATION AND REASONS FOR JUDGMENT

[1] Kelly Davy is before the Court on a two-count Information alleging that on or about September 12, 2023, she committed offences contrary to ss. 320.14(1)(a) and 320.14(1)(b) of the *Criminal Code*.

[2] The trial began with a *voir dire* on an application by Ms. Davy alleging the violation of her rights contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the "*Charter*"). The parties agreed to proceed with a blended *voir dire*.

[3] Crown presented one witness, Cst. Jeremy Teboul, on the *voir dire*. Defence did not present evidence. The parties agreed that the decision on the *voir dire* would be determinative of the offence contrary to s. 320.14(1)(b) of the *Criminal Code.*

[4] Ms. Davy asserts that her s. 8 *Charter* rights were violated when Cst. Teboul made a demand to her pursuant to s. 320.27(1) of the *Criminal Code* ("s. 320.27(1)") to provide a sample of her breath into an approved screening device ("ASD") without the required reasonable grounds to suspect that she had alcohol in her body. Absent the required grounds to make the demand, the search was not authorized by law and violated her s. 8 *Charter* rights.

[5] The Crown advised the Court that they were not presenting any evidence on the offence contrary to s. 320.14(1)(a) of the *Criminal Code*. Accordingly, I find Ms. Davy not guilty on Count one of the Information for the offence contrary to s. 320.14(1)(a) of the *Criminal Code.*

Evidence of Cst. Teboul

[6] Cst. Jeremy Teboul has been a member of the RCMP since September 2022 and was a general duty officer in Whitehorse, Yukon, at the time of this investigation.

[7] On September 12, 2023, he was in uniform and in a marked police vehicle responding to a call for service near the North Klondike Highway cut-off rest area on the Alaska Highway at approximately 10:51 p.m. The complaint involved three vehicles doing burnouts in the rest area which included one white truck. The complainant was

staying in the rest area in a travel trailer and advised that the vehicles were spinning and burning their tires.

[8] Cst. Teboul arrived at the rest area at approximately 11:12 p.m. at which time a white truck was exiting the rest stop. There was a teardrop travel trailer with a male standing outside who was pointing at the white truck as the police arrived. Cst. Teboul believed the male pointing at the white truck to be the complainant and proceeded to conduct a stop of the white truck which had entered the Alaska Highway. The purpose for stopping the truck was to verify the driver's license, registration and insurance, the mechanical fitness of the vehicle, and the sobriety of the driver. It was also for the purpose of responding to the complaint about the driving at the rest stop.

[9] Ms. Davy was identified as the driver of the vehicle. There was a male in the front passenger seat of the truck and a second male in the rear seat of the truck. Cst. Teboul had difficulty seeing inside the truck as it was higher than a stock truck and had heavily tinted windows. He stood on his tiptoes and used his flashlight to look inside at which time he noted two open alcohol beverage cans by the feet of the front seat passenger next to the middle console. The cans appeared to be open and empty as they were partially crushed and laying on the floor.

[10] During Cst. Teboul's interactions with Ms. Davy, which were somewhat unusual given the height of the truck, he did not observe a scent of alcohol coming from the truck or from Ms. Davy, or any physical observations of Ms. Davy such as a flushed face, or red or watery eyes. She provided the requested documentation without any

concern regarding her fine motor control, and there was nothing regarding her speech that indicated alcohol consumption.

[11] Based on his observations, Cst. Teboul formed a suspicion that Ms. Davy was operating a motor vehicle while impaired by alcohol. He proceeded to ask Ms. Davy if she had consumed any alcohol to which she answered that she had not. Cst. Teboul formed his suspicion and requested that his partner retrieve the ASD from the police vehicle, which took approximately 40 seconds, and then made the s. 320.27(1) demand.

[12] Cst. Teboul based his suspicion on the observation of the empty alcohol containers and a man believed to be the complainant pointing to the white truck, which he took as an indication that it was one of the vehicles referenced in the complaint.

[13] Ms. Davy provided a breath sample into the ASD which resulted in a fail. She was then arrested, advised of her *Charter* rights and given the police warning. A s. 320.28 breathalyzer demand followed, and Ms. Davy was escorted by Cst. Teboul in the police vehicle for the taking of the samples.

Did Cst. Teboul have reasonable grounds to suspect that Ms. Davy had alcohol in her body when he made the ASD demand?

[14] The ASD demand made by Cst. Teboul was pursuant to s. 320.27(1)(b) of the *Criminal Code*, which states:

> **Testing for presence of alcohol or drug**
>
> 320.27 (1) 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 conveyance, the peace officer may, by demand, require the person to comply with the requirements of either or both of paragraphs (a) and (b) in the case of alcohol or with the

> requirements of either or both of paragraphs (a) and (c) in the case of a drug:
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> ...
>
> (b) to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose;
>
> ...

[15] Ms. Davy submits that Cst. Teboul may have had a hunch, based on the observation of the crushed alcohol cans, regarding her having consumed alcohol, but that a hunch in and of itself does not amount to a reasonable suspicion. She relies on the decisions of *R. v. Vieira*, 2024 ONCJ 55, *R. v. Flight*, 2014 ABCA 185, and *R. v. Zakos*, 2022 ONCA 121, as authority for this argument.

[16] I note that *Vieira* involved an impaired driving investigation wherein the police officer attended the scene of an accident to locate the driver outside the vehicle with several others and smoking a cigarette. The officer made offensive remarks regarding cigarette smoke and there was an unpleasant exchange that ensued. Based on the demeanour of the accused, with no evidence of alcohol consumption, the officer made the demand under s. 320.27(1) asserting reasonable grounds to suspect that she had alcohol in her body. The suspicion was described as a hunch in the circumstances, with the Court noting at para. 57:

> The reasonable grounds to suspect standard would be too diluted if the mere fact of a minor collision and subsequent dismissiveness toward the police sufficed to conclude that the person had consumed alcohol. Up until the point of the ASD demand in this case, I see no objective indicia of alcohol consumption.

[17] In *Flight*, the police officer only had limited information as set out at para. 39:

> There is no question that Cst. Cunningham subjectively suspected that the appellant had alcohol in his body at the time of driving. A key contributing factor to his suspicion was the appellant's admission that he had "a couple of drinks at the golf course." The central issue can be framed as follows: where a driver admits to have consumed alcohol, but there is no clarification about the quantity or timing of consumption, is the driver's admission alone sufficient to ground an objectively justifiable, reasonable suspicion that the driver has alcohol in his body?

[18] The Court in *Flight* concluded on this issue at para. 61, after a thorough review of jurisprudence:

> In summary, I conclude that in most cases, admission of consumption alone will be sufficient to ground an objectively reasonable suspicion. Reasonable suspicion is a low standard. Police officers are not required to inquire into an alcohol consumption history with a driver at the roadside. However, each case must be assessed on its own facts. Police officers must respond to information as it unfolds.

[19] In this case, Cst. Teboul had more than a hunch in the circumstances as he saw two open and partially crushed cans of alcoholic beverages on the floor of the truck, on the front passenger side of the vehicle, within reach of Ms. Davy. There is no evidence of when the alcohol in the empty cans was consumed, or who consumed them. It is reasonable to conclude that they were likely consumed recently by the fact that they remained in the cab of the truck.

[20] In this case there is also a denial of alcohol consumption by Ms. Davy. The question about who consumed the alcohol, given that there were three occupants of the vehicle and two empty cans, was addressed in the Ontario Court of Justice decision of *R. v. Mason*, 2013 ONCJ 328, which involved an ASD demand that was “based on a

suspicion grounded in one swerve and a smell of alcohol coming from the vehicle with two occupants." Regarding the source of the smell of alcohol, the Court stated at para. 12:

> ...That a smell of alcohol coming from a confined space that includes the driver could *be* attributable to the passenger (or spilled alcohol, or an open bottle) does not deprive it of its ability to support a suspicion related to the driver. **If it could be the driver or it could be the passenger, in my view there is a reasonable suspicion in respect of each of them.**

[21] The Court in *Mason* concluded at para. 16:

> In conclusion, it is my view that the smell of alcohol from the vehicle provided the officer with reasonable grounds to suspect that the defendant had alcohol in her body. In addition the single instance of swerving that led to the stop gave further reasonable support to that suspicion.

[22] The more recent Ontario Court of Justice decision of *R. v. Devore*, [2022] O.J. No. 5833, dealt with similar facts to those before this Court, set out briefly at para. 17:

> There were two closed or sealed beer cans in the cup holders in the console between the driver and passenger seat. The logical inference to be drawn from the location and the number of these beers is that they were intended to be drank by either one or both of the occupants of the motor vehicle at some point in the future. And, there was an empty cardboard box in the back seat that was labelled for alcoholic beverages, a logical inference being that someone had drank the beverages originally contained in the box. Really, the officer had, based on his evidence, a subjective suspicion she had alcohol in her system and testified as such. In considering these grounds the primary issue the court must determine is whether in considering his observations the officer had an objectively reasonable suspicion that she had alcohol in her body.

[23] The Court in *Devore* continued with a thorough analysis of the law in this area, concluding at para. 37:

> In the case before me I am satisfied that Constable Janssens had both a subjective and objectively reasonable suspicion that the accused had alcohol in her body based on the odour of alcohol coming from within the motor vehicle when he spoke with her through the driver's side window, the time of night, the appearance of her glossy eyes, and the presence of two sealed cans of beer in the cup holder beside the driver in the middle console and the empty box of alcohol in the back seat. The officer did not have a duty to investigate where the odour was coming from. Further, the officer's lack of observation regarding other typically observed indicia often found in impaired drivers does not undermine a finding of a reasonable suspicion.

[24] The test to determine if an officer has the requisite reasonable grounds to suspect was set out by this Court in *R. v. Sidney*, 2018 YKTC 37, at paras. 19 and 20:

> 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.
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> 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.

[25] The reasonable suspicion threshold is not onerous and, as stated by the Ontario Court of Justice in *R. v. Brisson*, 2022 ONCJ 523, at para. 37, "...involves possibilities, rather than probabilities".

[26] It became clear from the cross-examination of Cst. Teboul that he does not have a strong understanding of the test for the grounds necessary to make the s. 320.27(1) demand, nor was he able to articulate why he chose to proceed under s. 320.27(1) rather than under s. 320.27(2). It is concerning that the training provided to the M Division RCMP members is either deficient on the fundamentals of the law, or that Cst. Teboul was certified despite a clear lack of understanding of the fundamentals.

[27] While I accept that Cst. Teboul held more than a hunch that Ms. Davy had consumed alcohol based on the observation of the empty cans in the cab of the truck, it was clear from his testimony that he did not understand that he was required to form a reasonable suspicion.

[28] Despite his inability to properly articulate the legal requirement of the suspicion, Cst. Teboul was steadfast in his belief that he held such a suspicion and clarified so on cross-examination when the wording from the prepared demand he used was put to him. Cst. Teboul did struggle at times grasping the technical concepts being put to him in English, and I note that English is clearly his second language with French being his first language.

[29] I am satisfied that Cst. Teboul held the requisite subjective suspicion to make the s. 320.27(1) demand. I must also be satisfied that the suspicion was objectively reasonable.

[30] Objective reasonableness is assessed from the perspective of a reasonable person placed in the position of the officer, with the officer's training, knowledge, and experience (see *R. v. Golebeski*, 2019 YKTC 50).

[31] The experience of Cst. Teboul at the time of this investigation was limited, having been an RCMP officer for approximately one year. He had the benefit of the ASD training for an even shorter period of time and based on his evidence, his understanding of the legal requirements to make the s. 320.27(1) demand was very limited.

[32] In addition to his observation of the alcohol beverage cans, Cst. Teboul was aware of the report from the complainant and believed Ms. Davy to be the driver of one of three vehicles doing burnouts in the rest area. The truck was pointed out to him as he approached the rest area by an individual believed to be the complainant, and this fact should be considered in the analysis of his reasonable suspicion (see *R. v. Schmidt*, 2024 YKSC 18).

[33] Viewed objectively, the evidence of driving is of little to no value given the delay of about 20 minutes in the RCMP arriving at the scene of the original complaint and the lack of context regarding the unknown male pointing to the white truck on their arrival. They had no information regarding the driving of the white truck, specifically at the time of the traffic stop. Given the nature of the complaint, I am unable to attribute the activity to the impairment of the driver.

[34] Considering the limited experience of Cst. Teboul and his lack of ability to articulate an understanding of the requirement for making a s. 320.27(1) demand, the

reasonable person analysis is not bolstered in any significant way by the fact that he is an RCMP officer. His observations of the driver, included:

- She exhibited no physical symptoms of intoxication;
- She was polite and cooperative;
- She had no difficulty locating and providing her documentation as requested by Cst. Teboul;
- She denied consuming any alcohol; and
- There was no odour of alcohol from her or the vehicle.

[35] This dearth of evidence does not support the suspicion asserted by Cst. Teboul. There is the additional evidence that the male passenger in the front passenger seat of the truck was being obnoxious towards the RCMP in a manner which could be interpreted as him being intoxicated. Adding the limited evidence of two empty and partially crushed alcohol cans at the feet of the passenger, I find that the suspicion held by Cst. Teboul was not objectively reasonable.

[36] The s. 320.27(1) demand made to Ms. Davy was not authorized by law and the breath sample that followed constituted a breach of her s. 8 *Charter* rights.

Section 24(2) *Charter* Analysis

[37] Having found a breach of Ms. Davy's s. 8 *Charter* rights, I will conduct a s. 24(2) *Charter* analysis and consider the exclusion of evidence.

[38] The test to be applied when considering the admissibility of evidence under s. 24(2) of the *Charter* was set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, and summarized at para. 71:

> ...When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. ...

[39] I will consider each of the three lines of inquiry individually as I assess and balance the effect of admitting the evidence on society's confidence in the justice system.

The Seriousness of the Charter-Infringing State Conduct

[40] The Supreme Court of Canada in *R. v. McColman*, 2023 SCC 8, applied the *Grant* analysis in the context of an impaired driving case, and set out the approach to the first *Grant* factor at paras. 57 and 58

> 57 The first line of inquiry focuses on the extent to which the state conduct at issue deviates from the rule of law. As this Court stated in *Grant*, at para. 72, this line of inquiry "requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct". Or as this Court phrased it in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at

> para. 22: "Did [the police conduct] involve misconduct from which the court should be concerned to dissociate itself?"
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> 58 In evaluating the gravity of the state conduct at issue, a court must "situate that conduct on a scale of culpability": *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 43. As Justice Doherty observed in *R. v. Blake*, 2010 ONCA 1, 251 C.C.C. (3d) 4, "the graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct": para. 23. To properly situate state conduct on the "scale of culpability", courts must also ask whether the presence of surrounding circumstances attenuates or exacerbates the seriousness of the state conduct: *Grant*, at para. 75. Were the police compelled to act quickly in order to prevent the disappearance of evidence? Did the police act in good faith? Could the police have obtained the evidence without a *Charter* violation? Only by adopting a holistic analysis can a court properly situate state conduct on the scale of culpability.

[41] There was nothing in the evidence before this Court to suggest that Cst. Teboul was not acting in good faith. He struggled to articulate the legal test required to make the 320.27(1) demand and there was no explanation provided for why he did not proceed under s. 320.27(2), which was available to him. Had he relied on s. 320.27(2), then the evidence could have been obtained without a *Charter* violation.

[42] Whether the lack of knowledge on the part of Cst. Teboul reflects the quality of training received, or his ability to retain what was being presented, his ignorance of the law as an officer certified to administer a s. 320.27(1) demand is troubling. This should be a minimum requirement of an officer in order to be certified and permitted to make the demand. Instead, there is evidence of ignorance of the law on the part of Cst. Teboul and this concerning lack of knowledge on his part favours an exclusion of evidence under this line of inquiry.

The Impact of the Breach on the Charter-Protected Interests of the Accused

[43] The Court in *McColman* addressed the second line of inquiry at para. 66:

> The second line of inquiry is aimed at the concern that admitting evidence obtained in violation of the *Charter* may send a message to the public that *Charter* rights are of little actual avail to the citizen. Courts must evaluate the extent to which the breach "actually undermined the interests protected by the right infringed": *Grant*, at para. 76. Like the first line of inquiry, the second line envisions a sliding scale of conduct, with "fleeting and technical" breaches at one end of the scale and "profoundly intrusive" breaches at the other: para. 76.

[44] Cst. Teboul did not articulate a clear understanding of the difference between s. 320.27(1) of the *Criminal Code*, which he purported to rely on, and s. 320.27(2) of the *Criminal Code*, the mandatory alcohol screening section, which states:

> (2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.

[45] The requirements for a peace officer to make an ASD demand pursuant to s. 320.27(2) of the *Criminal Code* are that the officer:

1. Has in his or her possession an approved screening device; and
2. Makes the demand in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law.

[46] At the time of the stop of Ms. Davy the ASD used by Cst. Teboul was in the police vehicle, and I am satisfied on the authorities filed that it was “in his possession” as required (see *R. v. Morrison*, 2020 SKPC 28; *R. v. Fisher*, 2023 ONCJ 9; *R. v. Wright*, 2023 SKKB 236).

[47] I am also satisfied on the evidence of Cst. Teboul that the initial detention and interaction with Ms. Davy was in the lawful exercise of his powers under the Yukon *Motor Vehicles Act*, RSY 2002, c 153.

[48] In these circumstances, as there was a clear lawful authority on the part of Cst. Teboul to make the s. 320.27(2) demand to Ms. Davy, the impact of the *Charter* breach before the Court is at the very low end. Cst. Teboul should have, in these circumstances, made the s. 320.27(2) demand which was available to him in the circumstances of the stop of Ms. Davy.

[49] This second line of inquiry favours the inclusion of the evidence.

Society's interest in the Adjudication of the Case on its Merits

[50] The Court in *McColman* addressed the third line of inquiry at paras. 69 and 70:

> 69 The third line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry requires courts to consider both the negative impact of admission of the evidence on the repute of the administration of justice and the impact of failing to admit the evidence: *Grant*, at para. 79. In each case, "it is the long-term repute of the administration of justice that must be assessed": *Harrison*, at para. 36.
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> 70 Under this third line of inquiry, courts should consider factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence, although this Court has recognized that the final factor can cut both ways: *Grant*, at

> paras. 81 and 83-84. While the public has a heightened interest in a determination on the merits where the offence is serious, it also has a vital interest in maintaining a justice system that is above reproach: para. 84.

[51] The Court in *McColman* addressed the seriousness of impaired driving and the impact of such offending on society, concluding at para. 73:

> In light of the reliability and importance of the evidence as well as the seriousness of the alleged offence, the third line of inquiry pulls strongly in favour of inclusion. Admission of the evidence in this case would better serve the truth-seeking function of the criminal trial process and would not damage the long-term repute of the justice system.

[52] The ASD breath sample provided by Ms. Davy is reliable for the limited purpose of forming the reasonable grounds for arrest and for the s. 320.28 demand. The evidence collected in the investigation that followed the s. 320.28 demand is highly reliable. The evidence is very important to the prosecution against her, and I find that the third line of inquiry favours the inclusion of the evidence.

Balancing the Grant Factors

[53] The Court in *McColman* provides guidance on balancing the three *Grant* factors at para. 74:

> When balancing the *Grant* factors, the cumulative weight of the first two lines of inquiry must be balanced against the third line of inquiry: *Lafrance*, at para. 90; *R. v. Beaver*, 2022 SCC 54, at para. 134. Here, the first line of inquiry slightly favours exclusion of the evidence and the second line of inquiry does so moderately. However, the third line of inquiry pulls strongly in favour of inclusion and, in our view, outweighs the cumulative weight of the first two lines of inquiry because of the crucial and reliable nature of the evidence as well as the important public policy concerns about the scourge of impaired driving. On the whole, considering all of the circumstances, the evidence should not be excluded under s. 24(2).

[54] In the case of Ms. Davy, the first two lines of inquiry when balanced moderately favour the inclusion of the evidence. The third line of inquiry also favours the inclusion of the evidence. Considered as a whole, the three *Grant* factors favour the inclusion of the evidence.

[55] I find that the results of the ASD sample taken from Ms. Davy and the evidence of the investigation that followed should not be excluded.

Conclusion

[56] A Certificate of Qualified Technician was filed by the Crown, recording Ms. Davy's compliance with a s. 320.28(1) demand and both of her samples registered 130 milligrams of alcohol in 100 millilitres of blood.

[57] Accordingly, I find Ms. Davy guilty on Count two, the offence contrary to s. 320.14(1)(b) of the *Criminal Code*.

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PHELPS T.C.J.