Citation: *R. v. Landry,* 2024 YKTC 25

Date: 20241007
Docket: 23-00546
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

CODY LANDRY

Appearances:
Ben Brillantes — Counsel for the Crown
David C. Tarnow — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Cody Landry is before the Court on an Information alleging that on or about October 19, 2023, he committed an offence contrary to s. 320.15(1) of the *Criminal Code*.

[2] On October 19, 2023, at approximately 2:45 a.m., Whitehorse RCMP received a complaint regarding a single vehicle accident on the Alaska Highway in the City of Whitehorse near the Kopper King trailer court. A vehicle had struck a light pole, knocking it over. RCMP members attended and located a Ford F350 pickup truck in the ditch and a light pole knocked to the ground and crossing the highway. Mr. Landry was

located standing at the driver's side door of the vehicle. He was identified by the RCMP by his driver's license and provided registration and insurance documentation for the vehicle. Emergency Medical Services ("EMS"), the fire department, and electric company personnel were also called to the scene. A s. 320.27(1) *Criminal Code* Approved Screening Device ("ASD") demand was made to Mr. Landry and, after 15 unsuccessful attempts by him to provide a suitable sample, he was charged with refusing to comply with the demand.

[3] Crown called two RCMP officers at trial, Cst. Julien Clement and Cst. Carson Hutton-Brown. Mr. Landry testified as the only defense witness.

Evidence of Cst. Julien Clement

[4] Cst. Clement was the lead RCMP investigator for the incident. His evidence on direct examination included:

- He arrived at the scene at about 3:00 a.m. and Mr. Landry was the only occupant of the truck and was seated in the driver's seat.

- He retrieved the keys for the truck, but does not recall how.

- His first interactions with Mr. Landry were focussed on safety in light of the accident. Mr. Landry appeared confused and dizzy but was cooperative in providing his drivers license and vehicle documentation.

- Mr. Landry volunteered that he "hit his head pretty good".

- He dealt with Mr. Landry for 10 to 20 minutes before EMS checked him out and did not note an odour of alcohol during that period.

- After EMS attended to Mr. Landry, an EMS attendant advised that he was emitting an odour of alcohol. This, along with observations of slurred speech resulted in a s. 320.27(1) *Criminal Code* ASD demand being made to Mr. Landry by Cst. Hutton-Brown.

- Mr. Landry was placed in the rear seat of a police vehicle and the scent of alcohol was confirmed as coming from Mr. Landry.

- Mr. Landry made 15 attempts into the ASD, administered by Cst. Hutton-Brown, each resulting in an unsuccessful sample.

[5] Cst. Clement's evidence on cross-examination included:

- He does not recall if Mr. Landry was put into the police vehicle while waiting the 10 to 20 minutes for EMS to attend.

- He conceded that he did not see Mr. Landry seated in the driver's seat of truck.

- He confirmed that Mr. Landry advised that he had nothing to drink that night.

- The truck was searched and there were no alcohol containers, full or empty, in the vehicle.

- He does not recall which ASD was used with Mr. Landry, stating it was "most likely" the one from Cst. Hutton-Brown's police vehicle.

- At the beginning of each shift, he confirms that the ASD in his vehicle has a valid calibration date by reviewing the expiry date on the ASD case. He does not turn the device on to confirm if it is operating properly.

- Mr. Landry complained during the ASD sampling process that he could not blow.

- He did not observe the ASD indicators after any of the unsuccessful sample attempts.

- He confirmed that the ASD will reset itself after several unsuccessful attempts but was not sure how many attempts resulted in a reset.

[6] Cst. Clement had significant issues with his recall of the events involving Mr. Landry. On several occasions in his testimony, he appeared to be guessing as to what occurred, and little weight can be attached to his evidence where it is not corroborated otherwise.

Evidence of Cst. Carson Hutton-Brown

[7] Cst. Hutton-Brown arrived at the scene of the accident immediately before Cst. Clement. His evidence on direct examination included:

- His police vehicle Watchguard audio and video was engaged from the time he left the detachment and turned on his emergency equipment in the vehicle. This included audio recording from a portable microphone attached to his person.

- Mr. Landry was in the driver's seat of the truck when he arrived at the scene.

- He identified Mr. Landry from Mr. Landry's driver's license but does not recall if he saw registration or insurance documentation for the vehicle.

- It was windy outside and he did not smell the odour of alcohol coming from Mr. Landry. He noted that Mr. Landry was somewhat unbalanced but attributed this to the accident.

- Mr. Landry had been offered the opportunity to go to the hospital by EMS, which he declined.

- He was down wind from Mr. Landry after Mr. Landry exited the ambulance and could detect an odour of alcohol coming from him.

- He placed Mr. Landry in the police vehicle given the temperature outside and the volume of emergency response personnel outside. In the vehicle, he made the s. 320.27(1) *Criminal Code* ASD demand to Mr. Landry.

- He does not know the make of the ASD, just that it is an ASD. He noted there is only one kind of ASD used in Whitehorse.

- He described how he started the ASD and administered the first three samples, and that the device does a reset after three consecutive attempts without a proper sample.

- He continued to attempt to get a sample from Mr. Landry six more times, after which he showed Mr. Landry how to do it by providing a sample himself. At this point he also advised Mr. Landry that he would give him a couple more opportunities to provide a sample, after which he would be charged with refusal.

- After the 15th unsuccessful attempt, the decision was made to charge Mr. Landry with the refusal.

- His observations of Mr. Landry were that he was breathing normally and had no difficulty talking. The only issue raised by Mr. Landry during the ASD attempts was that he was having difficulty providing a sample because he was a smoker.

[8] Cst. Hutton-Brown's evidence on cross-examination included:

- He does not know if the ASD shut down and reset again after the first time between the third and fourth attempt.

- He stated that the ASD would indicate “wait” if it was not ready to proceed. He conceded when shown the ASD manual that the word “wait” only comes up when initially powering on the device.

- He indicated that he did not look at the screen on the device after the unsuccessful attempts and believed when giving his answer it did say “wait”.

- He was not aware of why the device was not receiving a proper sample, only that it was not.

- He believed the device was working properly based on the sample he provided into the device to demonstrate the process to Mr. Landry.

- He conceded that Mr. Landry was not in the driver’s seat of the truck when he arrived at the scene.

[9] There are several exchanges during both the direct examination and the cross-examination of Cst. Hutton-Brown that call into question his overall reliability, and his reliability as it relates to the operation of the ASD with Mr. Landry. He testified that Mr. Landry was seated in the driver’s seat of the truck when he arrived at the scene, which was clearly not accurate given what was captured on the Watchguard video, leaving the distinct impression with the Court that he was not well prepared and was relying on a poor memory of the incident.

[10] During direct examination Cst. Hutton-Brown made the following comments regarding his understanding about the operation of the ASD used with Mr. Landry:

> Q: What is your general practice to tell when the device is ready to accept a sample?
>
> Cst. Hutton-Brown: It will tell you when it is ready.
>
> Q: How would you be able to tell if something was wrong with the device?
>
> Cst. Hutton-Brown: There would be a warning sign, an error code or it would not operate at all.

[11] This evidence is important even though he did not expand on this aspect of the operation of the ASD. It is clear from this exchange that the officer believed the instrument would provide notice in the form of a message on the screen if there were something wrong with its functioning. Given his evidence that he did not look at the ASD screen between samples, he could not know if such a warning sign or error code was being displayed.

[12] The Crown played the Watchguard video depicting the unsuccessful ASD samples attempted by Mr. Landry, pausing periodically to ask clarifying questions. After viewing the sixth unsuccessful attempt on the video, there was this exchange:

> Q: What are some of the incorrect things that he is doing so far that is leading to these negative results?
>
> Cst. Hutton-Brown: Just not providing sufficient flow to obtain a suitable sample.
>
> Q: We heard that you are off to get a second ASD. Why did you decide to do this?
>
> Cst. Hutton-Brown: I said we may have to get a second ASD just to have the benefit of doubt that we at least made every attempt to get a suitable breath sample.
>
> Q: Did you get a second ASD?
>
> Cst. Hutton-Brown: Eventually we will in the video.

[13] It is noteworthy that the video entered as an exhibit at trial does not depict a change from the first ASD to a second ASD. Cst. Hutton-Brown testified that the second ASD came from Cst. Clement's vehicle and that it had the same expiry date as the one from his vehicle. The next reference to a second ASD was after the eighth unsuccessful attempt, during the following exchange:

> Q: Here you're saying you are trying a new ASD. Did you change the ASD?
>
> Cst. Hutton-Brown: I'm not sure if this is the time when I change it, but I do obtain the second ASD and use that, I don't know exactly which sample it was switched over at but there was a second one used.
>
> Q: How many ASDs did you use?
>
> Cst. Hutton-Brown: Two ASDs.

[14] There is no evidence before the Court regarding when the second ASD was used. There is also seemingly contradictory evidence from Cst. Clement, who confirmed that both police vehicles were equipped with an ASD and testified as follows:

> Q: You came in a separate vehicle from Cst. Hutton-Brown?
>
> Cst. Clement: I don't recall that exact information, I believe so. Actually, yes, I came in a separate vehicle.
>
> Q: Whose ASD was used then?
>
> Cst. Clement: I don't recall that specific information. I think it was (indiscernible)...the ASD from A13 was most likely the one used.

[15] As noted, Cst. Clement had significant issues with his recall of the events involving Mr. Landry. He was clearly not of the view that two ASDs were used with Mr. Landry, despite being present during the operation of the ASD, and his testimony directly contradicts the limited memory of Cst. Hutton-Brown on this point.

[16] During the cross-examination of Cst. Hutton-Brown, there were two noteworthy exchanges regarding his operation of the ASD, the first being:

> Q: I think it was on the first machine you said to the Court after the third attempt the machine would shut down and it resets itself. Correct?
>
> Cst. Hutton-Brown: Yes.
>
> Q: And you sort of showed, you didn't show us on screen but that's what you did off screen. It shut itself down?
>
> Cst. Hutton-Brown: Yes.
>
> Q: You never told us anything about the other times it might have shut itself down?
>
> Cst. Hutton-Brown: No.
>
> Q: Because why? It didn't shut down, or wasn't operating properly or what?
>
> Cst. Hutton-Brown: I was never asked.
>
> Q: Asked by who? By my client?
>
> Cst. Hutton-Brown: I wasn't asked today.
>
> Q: Well, did it?
>
> Cst. Hutton-Brown: Not that I recall, No.
>
> Q: So, maybe it wasn't operating correctly?
>
> Cst. Hutton-Brown: I believe it was operating correctly.
>
> Q: Well, why didn't it shut down after the next three attempts?
>
> Cst. Hutton-Brown: I don't know.

[17] The cross-examination then shifts to what the ASD displayed to the officer after each attempted sample, with the following exchange:

> Q: Just going back to what the machine would indicate to you on a blow that wasn't sufficient. It would say "wait". That's what you told us. Is that correct?
>
> Cst. Hutton-Brown: Yes.
>
> Q: Is that what your manual says?
>
> Cst. Hutton-Brown: I don't have it in front of me.

[18] Defence counsel provided the manual and went through the possible messages that would follow an unsuccessful attempt, as well confirming that the word "wait" only comes up when you first power on the device. This is followed by the following exchange:

> Q: Were you even looking for the indications on the machine?
>
> Cst. Hutton-Brown: I did not look at the indications on the machine during the samples.
>
> Q: Well, why did you tell us earlier that it said "wait"?
>
> Cst. Hutton-Brown: I believe that it did say wait.
>
> Q: So maybe it wasn't operating correctly?
>
> Cst. Hutton-Brown: I believe it was operating correctly.
>
> Q: So, how can you explain the differences in what the manual might say are the indications and what your evidence is?
>
> Cst. Hutton-Brown: Again, I didn't look at the screen between the breath samples on this particular subject.

[19] By not looking at the device after an unsuccessful attempt, Cst. Hutton-Brown was unable to know what it was about the sample that made it unsuccessful, being the possible indicators he was questioned about. This goes to the direction that he was giving Mr. Landry and whether or not it was addressing the concern about the samples at all.

[20] Cst. Hutton-Brown had testified about the ASD displaying either a “warning sign” or an “error code” if it was not working properly. By not looking at the screen between samples, he cannot verify that a warning sign or error code was not coming up. It seems to be a reasonable likelihood given that the ASD, or both of them if a second one was used, were not resetting after three unsuccessful attempts were made.

[21] Cst. Hutton-Brown did show Mr. Landry how the ASD works by giving a sample himself before the nineth attempt, which he indicated worked properly and registered zero. He referred to this to indicate that the ASD was, in fact, working properly. There is no evidence before the Court to confirm which of the possibly two ASDs this was done with. Nor is there evidence of whether or not the second ASD, if in fact one was used, was used more than once. If it was used more than three times, there is a concern given the evidence of Cst. Hutton-Brown that it did not reset itself and may not have been functioning correctly.

Evidence of Mr. Landry

[22] Mr. Landry testified that he had been out on a work call and was returning home when a moose ran in front of his truck causing him to swerve and hit the light pole. He did not consume any alcohol prior to the accident and hit his head really hard in the accident. When he realized what had happened he felt horrible with a headache and is unsure if he lost consciousness on impact. He indicated that given how he was feeling, he did his best to provide a sample of his breath.

[23] Mr. Landry testified to an underlying medical issue to establish a reasonable excuse for not providing a suitable sample. I find it is not necessary in this case to address the reasonable excuse and will not set out the evidence on this point.

[24] I note that Mr. Landry was thoroughly cross-examined, and I did not find him to be credible. Elements of his evidence appeared to be contrived or were otherwise unbelievable based on the contradictory evidence before the Court. While I did not believe his evidence, I am mindful that I must apply the test set out in *R. v. W(D),* [1991] 1 S.C.R. 742, when assessing whether the Crown has proven the case against Mr. Landry beyond a reasonable doubt.

Law

[25] The law regarding a refusal to provide a breath sample was addressed by the Ontario Court of Justice in *R. v. Arudselvam*, 2022 ONCJ 445, at paras. 81 to 91:

> 81 . . . Specifically, the Crown only need prove the defendant knew a demand had been made and subsequently failed to supply a suitable sample. The onus then shifts to the defendant to establish, on a balance of probabilities, a reasonable excuse for his failure to provide a suitable sample.
>
> ...
>
> 90 The Crown must therefore establish three elements to prove the accused committed an offence under s. 320.15 (1):
>
> (i) There was a lawful demand made;
>
> (ii) The accused knew the demand was made;
>
> (iii) A failure or refusal by the accused to produce the required sample
>
> 91 It is well established that when considering whether the Crown has proved beyond a reasonable doubt that the accused has failed to comply

> with a breath demand, the court must look at all of the circumstances of the entire transaction between the police officer and the accused.

[26] Proof beyond a reasonable doubt in cases involving a refusal to provide a breath sample was central in the Ontario Court of Justice decisions of *R. v. Sharma*, [2010] O.J. No. 4579, and *R. v. Chisholm*, 2022 ONCJ 462.

[27] The Court in *Sharma* addressed the impact of officer reliability on a refusal charge at paras. 57 to 79:

> 57 Having observed Constable Rathbone carefully as she gave her testimony and repeatedly reviewing the transcript of her evidence, I find that she was most likely referring to an E0 message that she mislabeled as an "E01". The factors that lead me to this conclusion are as follows: Although she could not recollect what was on the screen on every attempt, her general understanding is that what she described as E01 is the normal response of the approved screening device when there is insufficient air; Constable Rathbone had no notes of the precise error message because she never writes down an E01, which, to her, signifies insufficient air; And finally Constable Rathbone knew that other error messages exist but never records them. The only one that was pertinent to her was the "E01", as she called it, indicating insufficient air. Any "other" message would have suggested a fault in the device.
>
> 58 Nevertheless, even though I believe Constable Rathbone likely saw an E0, I do have a doubt as to precisely what message the device gave and what Constable Rathbone did as a result.
>
> ...
>
> 62 Further, while I believe it is likely that Constable Rathbone saw an E1 message, the defence evidence does raise a reasonable doubt that it may have been an E01 message, which in turns raises a reasonable doubt about the functioning of the approved screening device. It is reasonably possible, if perhaps not probable, that Mr. Sharma could have blown hard enough or long enough to provide a proper sample, but the approved screening device was malfunctioning.
>
> ...
>
> 64 Even the evidence that is reflected in Constable Rathbone's notes suffers from a lack of certainty and precision. Complete precision is, of course, not a requirement, either in note-taking or in testifying. In a case like this, however, where the details of Mr. Sharma's conduct are essential in divining whether he

> actually did fail or refuse to provide a breath sample, vagueness on crucial points undermines the Crown's ability to prove its case beyond a reasonable doubt.
>
> ...
>
> 77 Taking all of the evidence into account, I am suspicious that Mr. Sharma was deliberately feigning his efforts to blow and trying to avoid providing a proper sample.
>
> 78 I am not, however, persuaded beyond a reasonable doubt. In particular, I have a doubt as to whether the Crown has proven the mens rea of the offence.
>
> 79 I am also not persuaded beyond a reasonable doubt that the approved screening device was functioning properly, given the confusion about the error messages.

[28] In a more recent decision, the Ontario Court of Justice in *Chisholm* considered concerns with a police officer's evidence on the operation of an ASD at paras. 6 to 10:

> 6 The officer administering the ASD tests fully explained the procedure and provided two self-test examples. His description of the test results was very brief. He testified that the accused blew into the device on the first attempt, but the blow registered a red light showing insufficient volume. He then said that the accused blew into the device 5 times with a similar result. On the 6th attempt the accused "failed again" and was charged. The accused was arrested and then released at the scene as it was a "straight refuse".
>
> 7 The ICC video was played which showed that an approved screening device was used and showed the wording of the ASD demand which had not been mentioned to that point. Otherwise, the Crown did not ask the officer many questions about the operation of the ASD, the significance if any of the tones that can be heard during the testing sequences and the specific results of each test.
>
> 8 In cross-examination it was established that the device makes a "beeping" noise when air enters the device. The officer described the error message for the first test would have been "blow interruption". His notes say "insufficient sample" which he agreed was a different ASD result. He said that he'd made a mistake writing that in his notes. His note that recorded *all* of the tests as "insufficient sample" was also mistaken. Cross-examination of another officer who arrested Mr. Chisholm showed that he did not see the result of the final ASD test before he placed Mr. Chisholm under arrest.

> 9 The Crown did not elicit the details of each failed test and the reason for each failure. Part of the answer may lie in the video evidence including the tones heard during the test sequences, but the Crown did not ask the officer to explain the tones and timing of "beeps" or tones. It's not for the court to engage in an analysis of individual tests without the benefit of witness testimony that has been tested in cross-examination. There is a particular concern with the last test which seemed to be longer than the prior attempts but was followed very quickly by arrest.
>
> 10 The officer who administered the test was right to provide multiple opportunities to Mr. Chisholm with patient instructions throughout. Unfortunately, the details of each test result were not accurately recorded nor were they sufficiently explained at trial. In that context, while I find I cannot accept Mr. Chisholm's evidence that he was trying to provide a sample on each attempt, I find his evidence in combination with the other evidence leaves a reasonable doubt.

[29] This case is not about whether the ASD was reliable and accurate, which it is presumed to be unless there is credible evidence to the contrary (see *R. v. McGuire*, 2021 YKSC 45). The Crown is required to prove the case against Mr. Landry beyond a reasonable doubt, and in doing so must satisfy the Court that the ASD was being operated properly. This would not be difficult to do on the evidence of an officer who is exercising diligence by proceeding in a fashion that reflects attention to the device messages and clear record keeping. With the use of Watchguard audio and video recording in the vast majority of these cases, the record keeping can be as simple as stating orally on the recording what the ASD indicates was the cause of the failed sample, and, for example, if there is a pause necessary for the device to reset after a series of failed attempts.

[30] Cst. Hutton-Brown did not satisfy the Court that he knew how to properly operate the ASD, or that the failed attempts by Mr. Landry to provide a suitable sample were not a result of issues with the ASD. He did not testify to the various sounds that the ASD

made before and after the samples were attempted and did not look at the device to learn what may have caused the failure. His inability to testify to what the device was reporting after each sample raises significant concerns about his conclusions that it was the sample, and not the device, that was the problem. While he demonstrated how to give a sample and testified that the device worked on that occasion, his evidence on the number of ASD's used and when they were used calls into question the reliability of the demonstration. The concern is compounded by the fact that there is no clear reliable evidence that a second ASD was, in fact, used or the number of attempts on the device. Nor was there evidence that the ASD, or both of them if in fact two were used, were resetting after three consecutive insufficient samples.

[31] I note that both Cst. Clemments and Cst. Hutton-Brown, as depicted in the Watchguard video, were patient with Mr. Landry and made significant efforts to make sure he had the opportunity to comply with the ASD demand. They appeared to be trying their best to assist Mr. Landry with complying.

[32] Despite my concerns regarding the credibility of Mr. Landry, I am left with considerable doubt by the dearth of evidence relating to the proper operation of the ASD and I find the Crown has failed to prove the charge alleged beyond a reasonable doubt.

[33] I find Mr. Landry not guilty of the offence before the Court.

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PHELPS T.C.J.