Citation: *R. v. Anderson*, 2024 YKTC 52 Date: 20241106
Docket: 24-00100
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Killeen

REX

v.

ARDEN ANDERSON

Appearances:
Arthur J. Ferguson — Counsel for the Crown
Amy E. Chandler — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] KILLEEN T.C.J. (Oral): The accused was charged with offences arising from an incident that took place on February 4, 2024. At that time, she was in the driver's seat of a car that was running but parked in a parking lot of a food store at about 2:15 a.m. A police officer, Cst. Teboul, was driving in Porter Creek and saw the car. He decided to check it. He found the accused and a passenger in the car. He made a demand for a sample to be provided into an approved screening device ("ASD"). The accused blew a fail. She later provided samples into an approved instrument and was charged with having a blood alcohol concentration that was equal to or exceeded 80 mg of alcohol in 100 mL of blood within two hours of operating a conveyance. She was also charged with impaired operation of a conveyance.

[2] The accused filed an application seeking to have the breath results excluded from evidence. The grounds related to the right to counsel, information provided to counsel by the officer, and the grounds for the demand were samples into an ASD.

[3] The trial proceeded on a *voir dire*. The evidence on the *voir dire* came from the arresting officer, as well as two video recordings from the incident and from the police car. At the conclusion of the *voir dire*, the Court dealt with the allegations involving the right to counsel and the information from the officer. No evidence was excluded based on those allegations. However, I reserved on the issue of reasonable suspicion that was the basis for the demand. This is the decision on that point.

[4] I will describe the incident.

[5] Cst. Teboul was on patrol in Porter Creek and saw a vehicle in the parking lot of a grocery store. He drove in to check it, as he could see the car was running. It was 2:15 in the morning, the store was closed, there was no evidence about when it had closed or when it would next open. Cst. Teboul walked to the car and spoke to the driver. He believed that a portable recording device was working; however, it was not. The camera in his car was recording the video of the event and later, the audio from inside of the cruiser was also recorded. The officer gave an explanation about the failure to have the recording device working. His explanation seems reasonable, particularly in light of the fact that he recorded the events once in the car.

[6] Ms. Anderson was in the driver's seat. There was a passenger in the front passenger seat. The car had what might be called a "lived in look". There were beverage containers on the floor and on the back seat. Most of those, if not all, were

alcoholic beverages, such as hard seltzer or Twisted Tea. There was a bottle of wine and a bottle of hard liquor in the car. At least some of the containers were empty. A can of hard seltzer was in the console cupholder. Another one was located on top of the console. It was not clear that Cst. Teboul had seen those two. He did not make any reference to them.

[7] There were also fast food containers, toilet paper, cell phone charging cables, and clothing in the car. On the floor of the back seat there was a cheque payable to the accused. There were other papers and garbage on the floor in the back.

[8] The officer asked the accused to provide her driver's licence. She did not have it with her, but he was able to confirm that she was licensed and had properly identified herself. He said that he routinely stopped vehicles to conduct document checks. He found it odd that her vehicle was parked in the lot of a closed store in a corner away from the store and facing a snowbank. It was a cold snowy night.

[9] When Cst. Teboul first spoke to the accused, she said she was waiting for someone to pick her up. The officer found it strange that she said that, given that she was in the driver's seat of a running car. He wondered why she did not simply drive away. He told her it was strange and did not get any clear explanation. He said that her eyes were bloodshot and glossy. There was no smell of alcohol. The officer saw the box of coolers in the back and saw the empty containers in the back on the floor. Based upon the bloodshot and glossy eyes, her comment, and the beverage containers, he said he formed a reasonable suspicion that she had alcohol in her system while operating a car.

[10] Cst. Teboul's direct evidence was that the grounds for his suspicion were that there was open liquor in the car accessible by the driver. His training was that open liquor combined with her glossy eyes and his initial interaction with her letter led him to believe she had alcohol in her system.

[11] Cst. Teboul had an ASD with him. He was qualified to operate the ASD; he had been trained in 2023. He said he had often used an ASD since that time. He made the demand for a sample to be provided into the ASD. She agreed to provide a sample. He went to his car to get the device. The demand was read from his card at 2:20 a.m. He told her how to provide a sample and inserted a fresh mouthpiece. She provided a suitable sample and blew a fail. Cst. Teboul understood the fail reading meant that she was impaired by alcohol. He had reason to believe she had committed an offence. He said he had the grounds now to make an arrest.

[12] Cst. Teboul was asked to explain the grounds and what he meant by reasonable suspicion. He spoke about his training. He said he was trained that to have a reasonable suspicion, he had to have a smell of alcohol from the breath, an admission of alcohol — by which I understood him to mean an admission of consumption of alcohol — and open liquor in the vehicle. He said it could also be the totality of observations of glossy eyes, bloodshot eyes, stumbling, slurred speech, and incoherent speech. If he had a reasonable suspicion, he could make a demand for a screening device sample.

[13] He understood he could make a demand for a breath sample into an approved instrument if he had a reason to believe the person was impaired. He initially did not

have that opinion about this accused. Cst. Teboul said there is a difference between grounds to suspect and grounds to believe. The fail reading on the screening device gave him the opinion that her ability to operate the vehicle was impaired by alcohol. He told her that and arrested her. She said she knew.

[14] He told her to get out of the car and go to his cruiser. For reasons that are not clear, she was handcuffed. She was cooperative throughout the interaction. The accused is a younger woman. There was nothing aggressive or resistant in her behaviour. In any event, the breath demand was made. She agreed to provide samples.

[15] I will not repeat the evidence about the officer telling her about her rights. As noted, the evidence was not excluded for any reasons relating to her rights.

[16] A second police officer arrived and took some photographs. The passenger was allowed to leave. The car was left with the other officer, who had called for a tow truck.

[17] The accused was transported to the Arrest Processing Unit. That was the closest location with an approved instrument.

[18] I am going to turn to the cross-examination of the officer.

[19] The officer did not know when the grocery store had closed. He agreed he had no idea whether either the accused or the passenger worked there. His report included, “The female immediately stated she was waiting for a ride.” The evidence in direct examination was that she was waiting for someone to pick her up. That was different from his evidence in cross-examination. While both phrases conveyed waiting for

someone else to arrive, his evidence in direct examination clearly stated that the ride was to be for her. In cross-examination, it was never stated that the ride was for her. He had not considered whether there was any explanation for the comment about waiting for a ride. Cst. Teboul assumed that she was speaking about a ride for herself but acknowledged that she may have been explaining that she was waiting for a ride for the passenger.

[20] I observed that while waiting on a cold snowy night, it would not be unusual to stay in a place of warmth.

[21] An officer is not required to ask questions, and a driver may not answer them in any event. Other courts have noted that since the driver need not answer the questions, there cannot be an obligation on the part of an officer to ask the questions. I cannot determine that Cst. Teboul should have asked her to explain herself. Much of the interaction was after her detention and before any notice of arrest. The things that were said may not be admissible, but they are things that may be considered as part of the grounds for the demand. The more fundamental problem on the evidence on this point is that, while I accept that he found her comment to be odd, I do not actually know what she said.

[22] In assessing a reasonable suspicion, the Court is to consider both the subjective belief of the officer and the objective basis for the belief. An officer may subjectively rely upon information which is later shown to be false. The fact that it is later shown to be false does not retroactively vitiate his reliance upon what he thought was true — but that is not the case here. His evidence at one point was that she was waiting for someone

to pick her up. At another point, his evidence was that she was waiting for a ride. Those statements are different.

[23] In order to assess that evidence and to consider his grounds for reasonable suspicion, I need to know what she said. I do not. I have inconsistent versions. One version, that she was waiting for someone to pick her up, is very odd indeed. It could lead to an inference that she knew she should not be driving and wanted to convey that to the officer immediately. The other version, that she was waiting for a ride, was in the context of a passenger sitting in the car. It would be reasonable to assume, without any further questions, that there may have been more to the situation. It would only be speculation to list possible explanations. The officer was not required to ask her to explain herself. Maybe any version that she explained would also have been considered odd. However, we have no reliable evidence about what was actually said.

[24] The officer went on and noted that his observation of the accused was that her eyes were bloodshot. He described what he meant by that but had difficulty with an English definition. His first language is not English and having some difficulty may not have been unusual. Generally, he was able to communicate very well in English. However, while he may generally have been able to communicate well in English, it is not the function of the Court to determine what he might have meant.

[25] There was extensive cross-examination on what he had recorded in his notes. His note described the eyes as bloodshot. He had not used the word glossy. In cross-examination, Cst. Teboul described that he had often dealt with people who had

been drinking. His interpretation of what they looked like was that they were glossy. He could not describe them further.

[26] I found his ability to communicate in English was generally quite good. I was surprised that he did not seem able to explain what bloodshot eyes meant. Generally, while I can guess what he meant, I am not able to place much weight on this. What I do accept is that her eyes looked like the eyes of someone who had been drinking.

[27] Cst. Teboul was also cross-examined with respect to his notes, including that he had seen open liquor in the vehicle and now had a suspicion that she was operating a vehicle while impaired by alcohol. He acknowledged the note but stressed that it was the totality of the circumstances, including the bloodshot eyes and then seeing the containers, that gave him the suspicion.

[28] The demand was made at 2:20 a.m. His notes on the demand read: "Care and control — open liquor seen behind the driver's seat gave suspicion." He disagreed the open liquor alone gave him the grounds.

[29] Cst. Teboul testified that suspicion is always based upon totality. That included the initial interaction, the glossy eyes, and the open liquor. He went on to describe his training and said that open liquor always gives grounds for an ASD:

> The way I was trained? Yes.
>
> Is it applicable to this case? No.

— is what he said.

[30] I will turn to my analysis of the evidence.

[31] The reasonable suspicion standard is set out in *R. v. Chehil*, 2013 SCC 49. Reasonable suspicion derives its rigour from the requirement that it be based upon 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.

[32] In *R. v. Kang-Brown*, 2008 SCC 18, at para. 75, Justice Binnie provided the following definition of reasonable suspicion:

> 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. … [Citations omitted]

[33] Reasonable suspicion is a lower standard than reasonable and probable grounds as it engages the reasonable possibility rather than the probability of crime. The Supreme Court of Canada in *Chehil*, at para. 29, states:

> Reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience. [Citations omitted]

[34] The officer’s first point was that the initial interaction with the accused raised the concern. He thought it odd that she said she was waiting for a ride while she was sitting

in the driver's seat of a running vehicle. He did not question her further about what she meant by that.

[35] Counsel for the accused pointed out there was another possible explanation for the comment was that she was waiting for a ride for the passenger. It was possible that someone was coming to pick him up rather than to have her drive him home. The officer did not know, for example, whether they worked at the store and were leaving after completing a shift.

[36] Two points require comment.

[37] First, the issue is that it is the officer's suspicion rather than proof beyond a reasonable doubt. Reasonable doubt may be based upon evidence or lack of evidence. A court is entitled to draw inferences from the totality of the evidence. However, at this point, we are not dealing with proof beyond a reasonable doubt.

[38] Second, the accused had raised the issue of the alleged breach of her *Charter of Rights and Freedoms*. As it is her motion, it is her onus to establish the breach on a balance of probabilities. It would be a mistake to confuse the issue by considering other possibilities that are based upon the lack of evidence about the store, the employment of the driver and the passenger, and any evidence about where either of them may have intended to go.

[39] Even with evidence on those points, the issue is not, for example, that the store closed minutes earlier at 2 a.m. or that she and the passenger work in the store. The issue is: did the officer find her comment to be odd and consider it with other factors as

part of his grounds to reasonably suspect she had alcohol in her system while operating a vehicle. If so, was that subjective assessment reasonable based objectively on the evidence.

[40] In order to rely upon his evidence on this issue, I have to know what she said. I do not. One version, that she was waiting to be picked up — his evidence in direct examination — is odd in the circumstances and would provide objective evidence consistent with his subjective belief. The other version, that she was waiting for a ride — his evidence in cross-examination — is capable of interpretation but also capable of providing some objective suspicion. However, I am unable to accept that either version was said by the accused.

[41] The uncertainty in his evidence on this point was in contrast to his certainty on other points. It is likely that the officer believed that the recording equipment was operating at that point and creating a reliable record of what was being said. It would be natural to proceed as he did not additionally noting her words in a notebook at the time. If the audio was being recorded, that would have been redundant and would only have delayed him. I do not fault Cst. Teboul for not recording the actual words said. I believe that he thought the recorder was working. However, not faulting him does not equate to knowing what she said. I do not rely upon this part of his grounds for the suspicion.

[42] The bloodshot or glossy eyes or glassy eyes suffers from a clear explanation as to what he meant by that comment. I accept that her eyes looked similar to what he had seen with others who had been drinking but absent anything else, I am not prepared to infer that what he saw is consistent only with consumption of alcohol.

[43] The third factor was the beverage containers in the car. This was confused by the note that implied that the open liquor gave him the suspicion. The officer understood that his notes were more than simply a resource to refresh his memory, they were also part of the disclosure that were going to be relied upon by both the Crown and defence. His note is consistent with the beverage containers being the sole reason for the demand. However, he insisted the containers were only part of the reason why he formed a suspicion, together with the initial interaction and the look of her eyes.

[44] At the time of first approaching the car, all Mr. Teboul knew was that it was running in a secluded part of the parking lot of a closed store after 2:00 in the morning. I accept that he approached her to ask her for her licence and then had a brief conversation about waiting for a ride. He did not smell liquor from the vehicle or the accused. I do not know what he meant when he commented about her eyes and decline to put weight upon that. The cans and other containers in the car are obvious from the photographs. They would have been visible as soon as they were illuminated. This was not consistent with containers being returned, for example, as would be the situation with containers being taken for a refund of deposit or being dropped at a recycling facility. It is consistent with the contents being consumed and the containers being discarded into the back. Whether that happened that night or earlier cannot be determined with certainty.

[45] Although the officer referred to open liquor, it is not clear that he had done anything to determine whether they were partially consumed cans or bottles, only empty cans, or some full cans or bottles. Photographs show a couple of beverage containers in or near the console. There is no evidence the officer saw either or both before

making the demand. He referred specifically to the containers in the back. The containers were not all from the same type of beverage. There were at least three types of coolers plus Jägermeister and a bottle of wine. There may have been many possible explanations for what caused them to be there, but none are in evidence. A reasonable assumption to anyone looking in the car could have been that one or both occupants had been drinking from them.

[46] I have considered the inference from the notebook entry that only the presence of “open liquor” led to the suspicion. The officer insisted the open liquor alone was not the basis for the demand. He stressed that it was the totality of the initial interaction, her eyes, and the open liquor. He had testified that the presence of open liquor alone gave rise to his demand. Then an analysis of why he called it open liquor as opposed to liquor containers would have been required. If any container was partially full or partially consumed and if she were the sole occupant of the vehicle, then the inference that she had been drinking from the container would have been reasonable. With two of them and no idea whether the containers were consumed that night or some other night, the inference becomes more tenuous but not unreasonable. The car did not appear to have been cleaned recently, if ever.

[47] Since the officer insisted that the presence of the containers alone was not the basis for the demand, there is no point in analysing what was there. The contents of the containers may have been consumed that night or at some other time. In the absence of the smell of liquor from her, nothing leads to the suspicion that she was at that point drinking from them.

[48] I am not able to conclude what was said in her initial interaction with the officer. I cannot rely on it. I am not able to determine what he meant by bloodshot or glassy eyes. I only conclude that he thought her eyes looked like the eyes of someone who had been drinking. From the limited evidence and explanation, I cannot conclude the appearance of her eyes is objectively consistent with the presence of alcohol in her body. He may have believed that, but the limited evidence does not support that inference.

[49] Whether the presence of beverage containers in the car leads to a reasonable suspicion all on its own, it was not what the officer was relying on. He insisted that it was the totality of the three factors: the initial interaction, the look of her eyes, and the presence of open liquor in the back. Two of those factors are not objectively present. This Court should not be trying to come up with a basis for the suspicion that was different from what the officer said.

[50] The totality of the circumstances relied on by the officer are not objectively present. Maybe it would have been different if his microphone was recording as he was at her car. Maybe it would have been different if he could articulate what he meant about her eyes. Maybe it would have been different if he had relied only on the presence of the beverage containers. However, what might have been is not what is in evidence and not what I rely upon.

[51] I am satisfied that the accused has demonstrated that the screening device was made without reasonable suspicion. That was a breach of her *Charter* right under s. 8. The subsequent demand for samples to be analysed by an approved instrument flowed

only from the screening device fail. Accordingly, those samples were also obtained in breach of the *Charter*.

[52] Section 24(2) analysis was simplified by the agreement of the Crown that the jurisprudence in this Court is to exclude the samples based upon the *R. v. Grant*, 2009 SCC 32 analysis. I will not repeat the analysis that has been done by other judges of this Court. The evidence of the screening device fail and the breath sample subsequently analysed are excluded.

[53] The admissible evidence is by agreement taken as read in on the trial. Exhibits 1, 4, 5, and 6 are admitted in the trial proper with the same exhibit numbers on the *voir dire*. Exhibits 2 and 3 are not admitted on the trial.

[54] I wish to make a point made by others with respect to screening device demands.

[55] Parliament made extensive amendments to the *Criminal Code* sections related to driving offences in 2018. Reasonable assessment of the amendments leads to the conclusion that Parliament's concern about the prevalence of drinking and driving was seeking to simplify the detection of drivers with alcohol in their system.

[56] In addition to the reasonable suspicion standard found in s. 320.27(1), there is also s. 320.27(2). This officer did not rely upon that section, which reads:

> 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.

[57] Cst. Teboul had a screening device in his possession. There was an admission that he was lawfully exercising his powers. There is no reason why he had to rely on subs. 1 when he could have relied upon subs. 2. Had he relied on subs. 2, none of the above analysis would have been required and the excluded evidence likely would have been admitted.

[58] This common practice of relying on reasonable suspicion, instead of relying on subsection 2, where it is applicable, needlessly complicates these cases.

[DISCUSSIONS]

[59] Mr. Ferguson, with the evidence excluded, do you have any submission with respect to convictions on either of the two counts?

[60] MR. FERGUSON: The Crown would invite an acquittal on both counts, Your Honour.

[61] THE COURT: Thank you. That seems reasonable. There was no evidence, in my mind, that could possibly have led to a conclusion that she was beyond a reasonable doubt impaired by alcohol. The evidence with respect to the blood alcohol counts has been excluded.

[62] Ms. Anderson, you put yourself, by your actions that night, into this position and I hope that it has taught you a significant lesson.

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KILLEEN T.C.J.