Citation: *R. v. Pye,* 2017 YKTC 57

Date: 20171117
Docket: 16-00749
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

BRAYDEN DOUGLAS ALEXANDER PYE

Appearances:
Leo Lane — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

REASONS FOR JUDGMENT AND RULING ON *CHARTER* APPLICATION

[1] On the night of August 31, 2016, Brandon Pye was involved in a serious motor vehicle collision in which his vehicle struck a parked truck with sufficient force to push it some 60 feet down the road and dislodge the attached truck canopy. He was the driver and sole occupant. Following investigation, Mr. Pye was charged with driving while impaired and driving while his blood alcohol content exceeded the legal limit. This latter count was withdrawn by the Crown on September 14, 2017. Trial with respect to the impaired driving charge proceeded by way of a *voir dire* to address a *Charter* application filed by the defence alleging breaches of ss. 8, 9 and 10(b). Following argument and submissions, defence decided to pursue only the s. 9 argument. Counsel jointly agreed that all evidence that I determine to be properly admissible on the *voir dire*

could be applied on the trial proper as the entirety of the case upon which to decide the ultimate issue of whether the offence of impaired driving has been established beyond a reasonable doubt.

[2] There are, therefore three issues to be addressed in this decision:

1. Was Mr. Pye's arrest an arbitrary detention contrary to s. 9 of the *Charter*?
2. If so, should the evidence of any observations made by Cst. Harding subsequent to the arrest be excluded pursuant to s. 24(2) of the *Charter*?
3. Based on the admissible evidence, has the Crown proven beyond a reasonable doubt that Mr. Pye's ability to operate a motor vehicle was impaired by alcohol?

Section 9

[3] The defence argues that Cst. Harding did not have reasonable grounds to arrest Mr. Pye for impaired driving, and, as a result, his arrest and subsequent detention amount to an arbitrary detention contrary to s. 9 of the *Charter*.

[4] It is well settled that a police officer's grounds must be both subjectively held and objectively reasonable. An assessment of the reasonableness of the grounds both subjectively and objectively is based only on the information available to the officer at the time the belief is formed (see *R. v. McClelland,* 1995 ABCA 199).

[5] Cst. Harding indicated that he arrived on scene and observed the aftermath of the accident. He approached and asked whether anyone was hurt. Bystanders advised him that the driver may be hurt and indicated that Mr. Pye was the driver. Mr. Pye was seated on the curb. Cst. Harding asked Mr. Pye for identification. Mr. Pye stood up,

and Cst. Harding noted that Mr. Pye seemed to have difficulty with balance and was unsteady on his feet when he walked toward him. When Cst. Harding got within a couple of feet, he could smell beverage alcohol coming from Mr. Pye's breath. As he was aware there had been a motor vehicle accident, he looked for visible signs of facial or head injuries but noted none.

[6] Cst. Harding indicated he had formed his opinion that Mr. Pye's ability to operate a motor vehicle was impaired by alcohol based on the nature of the collision; the fact Mr. Pye had been identified as the driver; the smell of alcohol on his breath; his unsteadiness on his feet; and, what Cst. Harding describes as slurred speech. He particularly noted the importance of the slurred speech in forming his opinion, indicating that, in his experience as a qualified breath technician, slurred speech means the individual has a blood alcohol content beyond the legal limit.

[7] Defence counsel argues that Mr. Pye was arbitrarily detained contrary to s. 9 of the *Charter* noting the speed with which the officer formed his opinion and questioning the reliability of the officer's evidence with respect to the indicia of impairment.

[8] Defence counsel relies on the decision of *R. v. Tosczak,* 2014 ABQB 86, to suggest that the short period of observation should result in a finding that Cst. Harding's opinion was not objectively reasonable in all of the circumstances. In *Tosczak*, Ross J. notes at paragraph 39:

> While there may be no minimum period, the time period of the investigation is part of the totality of the circumstances. The approximately one minute time period as found by the trial judge covered the time following the vehicle, pulling it over, and observing the Appellant in the drivers' seat. Clearly this means that the observed conduct – the

> vehicle drift and the fumbling for documents – were of very brief duration. It also means that the Constable had a very limited opportunity to assess the Appellant's "slow mumbled" speech.

[9] Ross J. concluded that the officer's opinion was not objectively supported.

[10] The Crown relies on the decision of the Ontario Court of Appeal in *R. v. Bush,* 2010 ONCA 554, for the proposition that there is no minimum time period required before an officer can be said to have objectively reasonable grounds:

> [70] The issue is not whether the officer could have conducted a more thorough investigation. The issue is whether, when the officer made the breath demand, he subjectively and objectively had reasonable and probable grounds to do so. That the belief was formed in less than one minute is not determinative. That an opinion of impairment of the ability to operate a motor vehicle can be made in under a minute is neither surprising nor unusual.

[11] The Crown has filed a number of additional cases involving accidents in which the facts bear some similarity to those in the case at bar. In *R. v. Eliuk*, 2002 ABCA 85, the Alberta Court of Appeal concluded that the smell of alcohol, slight swaying plus a serious accident met the requisite standard for reasonable and probable grounds. In *R. v. Gairdner* (1999), 40 M.V.R. (3d) 133 (B.C.S.C.), the B.C. Supreme Court found a motor vehicle accident, strong odour of alcohol, slurred speech, leaning on the vehicle and an apparent carefree attitude towards a serious accident amounted to a "marked departure from the normal" sufficient to find that the officer's opinion was objectively reasonable. In *R. v. Pedersen*, 2004 BCCA 64, the B.C. Court of Appeal found a fatal accident coupled with an admission of drinking, an odour of alcohol on the breath and a hand stamp confirming the appellant had been at a bar amounted to "evidence upon

which the justice of the peace acting judicially could determine that a warrant be issued".

[12] In *Bush,* it was noted at paragraph 54:

> Whether reasonable and probable grounds exist is a fact-based exercise dependent upon all the circumstances of the case. The totality of the circumstances must be considered: see *Shepherd* at para. 21; *R. v. Rhyason,* 2007 SCC 39; *R. v. Elvikis* [1997] O.J. No. 234 at para. 26; *Censoni* at para. 47. That an accident occurred, including the circumstances under which it occurred and the possible effects of it, must be taken into account by the officer along with the other evidence in determining whether there are reasonable and probable grounds to arrest for impaired driving. …

[13] In *R. v. Rhyason*, 2007 SCC 39, the Supreme Court of Canada upheld a conviction where the grounds were based on an admission of drinking, bloodshot eyes, an unusually blank stare, slow blinking, shaking, and an odour of alcohol on the breath, combined with the fact that the accused had struck and killed a pedestrian. However, the Court went on to note at paragraph 19:

> This is not to suggest that consumption plus an unexplained accident always generates reasonable and probable grounds or, conversely, that it never does. What is important is that determining whether there are reasonable and probable grounds is a fact-based exercise dependent upon the circumstances of the case. …

[14] The question, then, is whether on the facts of this case, it can be said that Cst. Harding's belief that Mr. Pye's ability to operate a motor vehicle was impaired by alcohol was objectively reasonable.

[15] As noted, this assessment is based only on the information that would have been available to Cst. Harding at the time he formed his belief. There are two areas of

concern with respect to Cst. Harding's evidence which raise questions about the reliability of his observations prior to forming his opinion and the objective reasonableness of that opinion.

[16] Firstly, Cst. Harding agreed that he had formed his opinion by the time he contacted dispatch to run licence plate and CPIC checks on an "MVI-68", which he noted to be the RCMP code for an impaired driver. Cst. Harding's interaction with Mr. Pye began when he asked Mr. Pye if he was alright at 22:23:58. He made the call to dispatch at 22:24:29. During the intervening 31 seconds, Cst. Harding is dealing not only with Mr. Pye, but is interacting with several bystanders as well. Clearly, the actual focus on Mr. Pye would have been something less than 31 seconds.

[17] In assessing the speed at which Cst. Harding arrived at his opinion, it should be noted that Cst. Harding did not have the 18 years of experience the officer had in the *Bush* case. Rather, Cst. Harding had two years and 10 months experience with the RCMP. He was, however, qualified to operate the approved screening device and had been a qualified breathalyzer technician for approximately three months, during which time he had conducted six or seven investigations.

[18] In light of Cst. Harding's relative inexperience, I have serious concerns that his observations were no more than perfunctory at best. Even if I were to accept Cst. Harding's evidence with respect to his observations at face value, with the fact that many of his observations could have been equally explained by the fact Mr. Pye had just been in an accident, one would expect more care taken in assessing Mr. Pye's condition, before forming a belief, rather than a suspicion, that his ability to operate a

motor vehicle was impaired by alcohol. While Cst. Harding does say that he was live to this issue and thus looking for obvious signs of injury, and he did ask Mr. Pye if he was alright to which he received an affirmative response, it is notable that Cst. Harding did not ask Mr. Pye whether he hit his head in the accident until after he affected the arrest.

[19] That being said, while I question the speed at which Cst. Harding formed his opinion, I do not believe that speed alone would be a sufficient basis upon which to conclude that his opinion was not objectively reasonable. However, this concern is exacerbated by concerns regarding the reliability of Cst. Harding's observations.

[20] With respect to the issue of speech, I agree with defence counsel that there is a question about the reliability of Cst. Harding's evidence on this point. His opinion as to speech was based on a few words, namely "I ran into that parked car over there". Cst. Harding was unable to articulate in a meaningful way how Mr. Pye's speech was slurred in those few words; and I certainly had difficulty, when the WatchGuard Video was played, in detecting anything that could be described as slurred. Mr. Pye's speech is certainly slow, but I have no way of knowing what his normal speech pattern is such that I could conclude, on so brief an exchange, that his speech immediately prior to his arrest was a departure from the norm; nor was there any evidence that Cst. Harding was familiar with Mr. Pye and his normal speech pattern. I conclude, as a result, that the reference to slurred speech at the time the opinion was formed is not sufficiently reliable to be considered as part of the basis for the opinion.

[21] With respect to the issue of balance, Cst. Harding's assessment, prior to forming his opinion, was based on no more than Mr. Pye getting up from the curb and taking a

couple of steps toward him. Noting that the curb was low to the ground, and that Mr. Pye had just been in an accident, balance issues in getting to his feet would not be surprising, and would not necessarily be indicative of impairment by alcohol.

[22] Furthermore, Cst. Harding indicated that Mr. Pye remained unsteady on his feet after the arrest; however, there appear to be no observable issues with balance in the period of time that Mr. Pye is visible on the WatchGuard footage as he walks toward the police vehicle. Given the limited opportunity to assess balance and the fact that balance issues are not readily apparent after the arrest, I conclude that I have some difficulty with the reliability of the officer's assessment of Mr. Pye's balance. I would also note, that the officer did not observe any problems with fine motor coordination as Mr. Pye produced his driver's licence.

[23] With respect to smell of alcohol, Defence counsel questions the reliability of Cst. Harding's assessment on the basis it was made when Mr. Pye was not speaking, was smoking a cigarette, and was a few feet away. While Cst. Harding does say that he got within a couple of feet of Mr. Pye, I question the overall reliability of his observation with respect to smell, given the opportunity for Cst. Harding to note the smell of alcohol specifically from Mr. Pye's breath in the circumstances and time frame that he describes.

[24] The evidence is clear that Cst. Harding observed the aftermath of an accident for which there was no obvious explanation. The road conditions were clear and dry; the area was well lit; and the road was sufficiently wide to allow ample room for circulating traffic and parked vehicles. However, I find that the speed at which this relatively junior

officer formed his opinion and the fact that his observations were of questionable reliability combine to satisfy me that Cst. Harding's opinion was not objectively reasonable in all the circumstances. As a result, I conclude that he did not have reasonable grounds to arrest Mr. Pye. The arrest, therefore, resulted in an arbitrary detention contrary to s. 9 of the *Charter*.

Section 24(2)

[25] Having concluded that Mr. Pye's rights with respect to s. 9 were breached in the circumstances of this case, issue number two is whether evidence, specifically the evidence of Cst. Harding's observations of Mr. Pye following the arrest, should be excluded pursuant to s. 24(2) of the *Charter*.

[26] In *R. v. Grant*, 2009 SCC 32, the Supreme Court of Canada set out the test for exclusion, namely consideration of three factors: the seriousness of the conduct which led to the discovery of the evidence, the impact on the accused's *Charter*-protected interests, and society's interest in adjudication on the merits. The court's role is to balance these three considerations with a view to determining whether, in all of the circumstances, admission of the evidence would bring the administration into disrepute.

[27] With respect to the first consideration, the seriousness of the *Charter*-infringing conduct, defence counsel argues that Cst. Harding ought to have been well aware of his obligations to ensure reasonable grounds before arresting Mr. Pye, and thus his failure to do so would militate in favour of exclusion.

[28] A deprivation of liberty should never be taken lightly. In this case, the deprivation flowed from an almost immediate assumption that Mr. Pye's ability to operate a motor vehicle was impaired by alcohol. As noted by Cozens J. in *R. v. Wells,* 2017 YKTC 34, at paragraph 74:

> Failing to comply with a statutorily required threshold for delaying an individual in order to obtain a breath sample cannot be said to be simply a technical or minor error. Regardless of the good intentions of Cst. Harding, this does not amount to an insignificant breach. The need for police officers to comply with *Charter* obligations, in light of powers provided to police officers, is important in order for confidence in the justice system to be maintained.

[29] It should be noted that the *Wells* case involved a section 9 *Charter* breach in relation to an ASD demand where only a reasonable suspicion is required. To arrest, as in this case, requires a higher standard with respect to grounds.

[30] When I consider Cst. Harding's somewhat cavalier attitude towards ensuring that he had fairly assessed the situation before forming his opinion and arresting Mr. Pye, I would agree that an assessment of the first of the three considerations would support exclusion.

[31] The second factor under *Grant*, the impact on the accused's *Charter*-protected interests requires a consideration of the extent to which the *Charter* breach "intruded upon the privacy, bodily integrity and human dignity of the accused" (see *R. v. Loewen*, 2009 YKTC 116, paragraph 40).

[32] Mr. Pye had been charged with driving while the concentration of alcohol in his blood exceeded the legal limit, and I understand that samples of his blood were taken

from him at some point. While it is generally accepted that breath samples provided into an approved screening device are only minimally intrusive, the same cannot be said of blood samples. However, as the Crown has opted not to proceed with that charge, there is no evidence before me as to the circumstances in which the blood samples would have been taken, so I am unable to factor that into the analysis. What I can consider is that Mr. Pye was handcuffed and placed in the back of a police vehicle in fairly public circumstances, which I would consider to be an intrusion upon both his privacy and dignity.

[33] Had the admissibility of samples been at issue, I would have little difficulty in concluding that this factor would favour exclusion. The level of intrusion that can be considered in this case is less, and therefore more equivocal with respect to the question of admissibility.

[34] With respect to the third factor, society's interest in adjudication on the merits, it must be conceded that there is clearly a societal interest in removing impaired drivers from the roads. This consideration looks at the reliability of the evidence and its importance to the Crown's case. In this case, the evidence has neither the degree of reliability nor the importance to the Crown's case as would blood alcohol readings. Having noted concerns with respect to the reliability of Cst. Harding's evidence prior to the arrest, the same would apply to observations after arrest, save for behaviour which was also caught by the WatchGuard Video. This would clearly be reliable, though given the serious accident the cause would be in question. However, as in most cases, I would say that this third factor would weigh in favour of inclusion rather than exclusion.

[35] In balancing the three factors in *Grant*, I would adopt the comments of Lilles J. in *Loewen* at paragraph 42:

> The inquiries conducted pursuant to the second and third branches of the *Grant* analysis supports admission of the evidence of the breath samples. The first line of inquiry, on the other hand, strongly supports exclusion. The officer ignored the statutory threshold for demanding a roadside screening device. This is not a technical, minor or inadvertent deficiency. This is not a case where the law to be applied is ambiguous – it is well established, clear and unambiguous. As stated in *Grant*, at para. 74: "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith".

[36] I conclude that the breach in this case is sufficiently serious, in all the circumstances, that its admission would bring the administration of justice into disrepute. Accordingly, I find that the evidence of all observations made by Cst. Harding following the precipitous arrest of Mr. Pye, including those captured by the WatchGuard Video, should be excluded.

Impairment

[37] The remaining question is whether the evidence admissible on the trial proper is sufficient to establish that Mr. Pye's ability to operate a motor vehicle was impaired by alcohol. The burden rests on the Crown to prove guilt beyond a reasonable doubt, although Crown is right in submitting that they need only prove some degree of impairment by alcohol. (see *R. v. Stellato* (1993) 12 O.R. (3d) 90 (C.A.), aff'd [1994] 2 S.C.R. 478), upheld by Supreme Court of Canada, 1994 CarswellOnt 84)

[38] In assessing the evidence with respect to impairment, it must be noted that Crown called three civilian witnesses in addition to Cst. Harding, Christopher Evans, the

owner of the parked truck struck by Mr. Pye, Natalie Thieverge, Mr. Evans' spouse, and Cassandra Tessier, who lives across the street from Mr. Evans and Ms. Thieverge. None of the three witnesses observed the accident, though all heard the collision. All three provided evidence which clearly establishes that Mr. Pye was the driver of the vehicle that struck Mr. Evans' truck.

[39] Mr. Evans' evidence, including the photographs he took, indicates that Mr. Pye struck Mr. Evans' truck with a significant amount of force, enough to push the truck some 60 to 70 feet and dislodge the truck canopy. Mr. Evans noted that Mr. Pye seemed distraught and resigned. He did not describe any indicia of impairment by alcohol.

[40] Ms. Thieverge says she ran out of the house as she thought Mr. Pye was going to drive away. The engine was still running and making noises which suggested to her that he was trying to back up and dislodge his vehicle. She yelled at him to stay put. Mr. Pye got out of the vehicle and put his hands up. She says she was speaking to her tenant about the loss of Mr. Evans' truck when Mr. Pye said, "I said I was fucking sorry". Mr. Pye sat on the curb smoking a cigarette. She says she would have expected him, if sober, to walk around and assess the situation, and found it odd that he just sat there not seeming to know or care what was going on. During Mr. Pye's exchange with Cst. Harding, she did not observe anything noteworthy. She did not describe any indicia of impairment by alcohol.

[41] Ms. Tessier says that she observed Mr. Pye walking around, unstable or wobbly on his feet, trying to figure out which way he wanted to go. She suggested he sit down and not go anywhere. He asked for a cigarette and she provided him with one.

[42] The evidence of these three civilians with respect to impairment, in conjunction with the admissible evidence from Cst. Harding, can be summarized as follows:

- An unexplained accident in good road and lighting conditions;
- Unsteadiness on his feet;
- Some disorientation and behaviour that seemed odd in the circumstances; and
- An indication of smell of alcohol.

[43] It must be remembered, however, that Mr. Pye had just been in a serious motor vehicle accident. Balance issues and disorientation could as easily be explained by the accident as by alcohol impairment.

[44] The Crown argues that there was no evidence of a brain injury or concussion or any visible injuries that might explain Mr. Pye's symptoms. Crown also stresses it is problematic that no explanation has been provided for the accident. Crown appears to suggest that the only inference that can be drawn absent evidence on accident causation and injury, when combined with the balance issues and the smell of alcohol, is that Mr. Pye's ability to operate a motor vehicle was impaired by alcohol.

[45] Firstly, I would note that alcohol impairment is not the only possible explanation for the accident. Fatigue, momentary inattention, and distracted driving are all possible explanations along with alcohol impairment. The absence of an explanation does not

allow me to conclude that it has been proven beyond a reasonable doubt that the cause must have been impairment by alcohol.

[46] Secondly, to draw such an inference would, in my view, result in an improper shifting of the onus onto Mr. Pye. There is no requirement for Mr. Pye to prove anything with respect to either the cause of the accident or whether he did, in fact, suffer injuries in the accident that would explain any symptoms observed. Rather the burden remains on the Crown to refute the possibility of a head injury as a possible explanation for the symptoms observed. (see *R. v. Franklin* (1997), 221 A.R. 356 (Q.B.) ; *R. v. Thandi (*1998), 39 M.V.R. (3d) 78 (B.C.C.A.))

[47] There is no evidence before me that Mr. Pye did, in fact, suffer a head injury. Nor is there any evidence to confirm that he did not. The only evidence before me is Cst. Harding's evidence in relation to the on-scene paramedic assessment and what Cst. Harding was told by the doctor who treated Mr. Pye at the hospital. The paramedic assessment was that Mr. Pye should be transported to hospital. The exchange on the WatchGuard Video suggests that this decision was based on the nature and apparent force of the collision, Mr. Pye's mental state, and the fact that it was unknown whether Mr. Pye had lost consciousness or whether he had been wearing a seatbelt. Cst. Harding said the doctor advised him that Mr. Pye would be staying in the hospital for several hours.

[48] While the hearsay evidence of the doctor is not admissible for the truth of its contents, it along with the paramedic assessment certainly suggests that Mr. Pye had medical issues to be addressed. It was open to the Crown to call the paramedic or the

doctor who treated Mr. Pye on the issue of impairment and whether Mr. Pye had or had not suffered any injury that could otherwise explain the symptoms observed. They chose not to do so. Absent such evidence, I find, in all of the circumstances, that injuries suffered in the accident could be a possible explanation for symptoms observed.

[49] The smell of alcohol is the only factor which could not equally be attributed to the accident. However, as already noted, I have concerns about the reliability of Cst. Harding's evidence on this point. Furthermore, it is notable that Ms. Tessier did not indicate that she smelled alcohol on Mr. Pye's breath despite being close enough to hand him a cigarette. Considering all of the evidence, I conclude that I am not satisfied beyond a reasonable doubt that there was a smell of alcohol on Mr. Pye's breath. Even if I were so satisfied, the smell of alcohol would be indicative only of consumption and not of impairment.

[50] The totality of the evidence before me falls well short of the standard of proof beyond a reasonable doubt. In the result, I direct that an acquittal be entered with respect to count 1.

[51] Before concluding, however, I do want to note that had I found that the evidence of Cst. Harding's observations and the WatchGuard Video footage following the arrest were admissible, I would still have concluded that Crown had not proven, beyond a reasonable doubt, that Mr. Pye's ability to operate a motor vehicle was impaired by alcohol.

[52] Such admission would have resulted in further, perhaps more reliable, evidence of a smell of alcohol on Mr. Pye's breath, but, again, this would only have been indicative of consumption not impairment.

[53] In addition to smell of alcohol, the Crown refers to a number of points in the WatchGuard Video as indicative of impairment, which I would address as follows:

1. Trouble pronouncing Griffiths Heating: I did not notice any appreciable difficulty, though I would not describe his enunciation as particularly clear;

2. Head and shoulders slumping forward: what Crown refers to as "unusually relaxed/drowsy given the perilous event and arrest by police" can, in my view, be equally attributable to the accident;

3. Muddled responses to 10(b) instructions, slurring, talking over officer, and confusion with respect to role of ambulance staff: Mr. Pye's speech is slow and, at times, mild slurring is noticeable; however, it is not a pronounced slur. While I would not describe his responses to the officer as muddled, there is evidence of some confusion in the interaction with both the officer and the paramedic. The mild slurring, slow speech, and confusion, however, could again be attributable to the accident.

[54] There is nothing in the inadmissible footage or observations of Cst. Harding which would elevate the quality of evidence to proof beyond a reasonable doubt in my view. Accordingly, I would not have convicted even with the addition of the excluded evidence.

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RUDDY C.J.T.C.