

Citation: *R. v. Wabisca*, 2018 YKTC 7

Date: 20180302
Docket: 17-00090
Registry: Whitehorse

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

REGINA

v.

DYLAN MICHAEL WABISCA

Appearances:
Leo Lane
Amy Steele

Counsel for the Crown
Counsel for the Defence

RULING ON *CHARTER APPLICATION*

[1] Dylan Wabisca is charged with six counts including impaired driving, refusing to provide a breath sample, two counts of assaulting a peace officer, resisting arrest, and breaching a term of his probation order by failing to keep the peace, all arising on April 11, 2017. Crown has directed a stay of proceedings in relation to the refusal charge. Mr. Wabisca's trial on the remaining counts began by way of a *voir dire* in relation to a defence application asserting that Mr. Wabisca's section 9 *Charter* right was violated on the basis the arresting officer did not have the requisite grounds to believe that Mr. Wabisca's ability to operate a motor vehicle was impaired by alcohol when he arrested Mr. Wabisca and made the breath demand, thereby resulting in an unlawful arrest and an arbitrary detention.

[2] Counsel have indicated that they would like my ruling on the s. 9 application, before making submissions on any applicable remedies should I be satisfied that a breach of s. 9 has been made out. This is my ruling and the reasons therefor.

[3] Evidence on the *voir dire* included the testimony of the arresting officer, Cst. Miller, the WatchGuard video from Cst. Miller's vehicle, and surveillance footage from Goody's Gas Convenience Store ("Goody's"). While Cst. Miller provided the entirety of his trial testimony on the *voir dire*, the relevant portions, for the purpose of this ruling, extend only to the arrest and breath demand as the law is clear that an assessment of the reasonableness of an officer's grounds must be based solely on the information available to the officer at the time the belief is formed.

[4] It is well settled that the officer's belief must not only be subjectively held by the officer, but must also be objectively reasonable. A review of the case law indicates that an assessment of objective reasonableness includes the following factors:

- The test is whether there are reasonable grounds to believe the accused's ability to drive was impaired by alcohol to even a slight degree;
- 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;
- The assessment must be based on the totality of the circumstances;
- The question is whether the officer's belief was reasonable at the time the belief is formed, not whether it was subsequently proven to be accurate;

- The reasonableness standard is defined as being more than a mere suspicion, but less than either proof beyond a reasonable doubt or the civil standard of proof on a balance of probabilities.

(See *R. v. Bush*, 2010 ONCA 554; *R. v. Nguyen*, 2017 BCPC 131; *R. v. Lavallee*, 2016 YKTC 57)

[5] Cst. Miller is a member of the RCMP with eight years' experience, primarily in small Northern communities. He transferred to Whitehorse in August, 2016. He became a qualified breath technician in November, 2013 and was qualified to operate the approved screening device in the spring of 2014. He estimates that 80% of the calls he has received over the course of his career involve persons who are intoxicated by alcohol.

[6] Cst. Miller testified that he was working the night shift on April 11, 2017, and was parked in his police vehicle in a parking lot adjacent to Centennial Street in Porter Creek next to the Casa Loma Motel, which includes both motel accommodations and a bar. His position allowed him to see vehicles entering or leaving the Casa Loma parking lot, but not the entrance to the bar itself.

[7] At 12:45 a.m., Cst. Miller saw a dark Dodge pick-up truck pull out of the Casa Loma parking lot and turn right onto Centennial Street. He says the vehicle accelerated quickly; came to an abrupt stop at the intersection of Centennial Street and Wann Road where it spun its tires before accelerating again. The truck then turned left into Goody's parking lot where it came to a jerky stop, parked at a 45 degree angle a couple of metres back from the curb, a position Cst. Miller termed unusual.

[8] From his parked position, Cst. Miller says he saw someone exit the driver's side door of the truck and walk into the front entrance of Goody's. He describes the individual as wearing a ball cap, jeans and a grey sweatshirt and walking slowly with a staggered gait. Cst. Miller testified that his police vehicle was parked 150 metres away from the intersection at Centennial Street and Wann Road, and an additional 125 metres, for a total distance of 275 metres, from where the truck was parked in Goody's parking lot.

[9] Cst. Miller drove to Goody's, arriving approximately two minutes after the truck. He noted a male seemingly passed out in the passenger seat of the truck. Cst. Miller went into the store where he positioned himself behind and to the right of Mr. Wabisca, standing approximately two metres away from where Mr. Wabisca was making his purchase at the counter. Cst. Miller says Mr. Wabisca seemed to sway; fumbled with his wallet and card; dipped his chin when he turned to look at Cst. Miller; and had glazed eyes.

[10] Cst. Miller followed Mr. Wabisca out of Goody's, where he asked Mr. Wabisca where he had come from. Mr. Wabisca lied to Cst. Miller, suggesting he had come from the East on Wann Road rather than North on Centennial Street as observed by the officer. There were no questions in relation to whether Mr. Wabisca had consumed alcohol, no indication of slurred speech, and Cst. Miller did not note any smell of alcohol until after the arrest when Mr. Wabisca was placed in his police vehicle.

[11] Cst. Miller arrested Mr. Wabisca for impaired driving. He says he formed his opinion that Mr. Wabisca's ability to drive was impaired by alcohol based on the following:

- Mr. Wabisca was observed leaving the vicinity of a bar after midnight;
- The driving pattern observed;
- Mr. Wabisca's gait; and
- The described difficulties with fine and gross motor coordination observed at the Goody's counter.

[12] Cst. Miller indicated that the video footage, both from his police vehicle and from Goody's, accurately depict what he observed on April 11, 2017.

[13] Defence counsel argues that Cst. Miller's observations are insufficient to establish reasonable grounds on either a subjective or an objective basis. She argues, firstly, that there were insufficient grounds to conclude that Mr. Wabisca was the driver of the truck and questions whether Cst. Miller could have seen and heard what he testified to from his police vehicle given the lighting conditions and the distance. She further argues that the officer's evidence with respect to indicia of impairment was unreliable and not supported by the video evidence.

[14] Crown argues that there is no evidence that the officer could not have seen and heard what he testified to from that distance. He submits the officer was credible and the totality of his observations is sufficient to establish grounds, in light of his eight years' experience.

[15] While the WatchGuard video does not capture any of the driving pattern described by Cst. Miller, it does give some sense of the distance between where Cst. Miller was initially parked and the location of the truck in the Goody's parking lot. The distance is not insignificant and it is clearly dark out; however, the distance is not so great, and the intersection of Centennial Street and Wann Road is sufficiently well lit, that I accept that Cst. Miller could have seen the driving pattern described, including dust kicked up when the tires spun before leaving the intersection. Similarly, while the location of the truck in the Goody's parking lot is dark enough that the truck itself is somewhat indistinct, the gas pump area of Goody's is well lit enough for the officer to have observed the very basic clothing described in his evidence and potential issues with Mr. Wabisca's gait, although the opportunity to see detail or to assess Mr. Wabisca's gait with any degree of clarity or accuracy would, in the circumstances, have been quite limited.

[16] For similar reasons, I am of the view that Cst. Miller had ample grounds to believe that Mr. Wabisca was the driver of the truck. While relatively dark in the area where the truck was parked, I am satisfied that the officer could, nonetheless, discern from which door the individual exited the vehicle. This combined with the fact the other occupant of the truck appeared to be passed out in the passenger seat, and that there were only two other customers in the area who were clearly together, satisfy me that there would be little reason to conclude that anyone other than Mr. Wabisca had been driving the truck.

[17] I am satisfied that Cst. Miller had observed enough, even given the lighting conditions and the distance, at least to justify his decision to follow up. What remains

at issue is whether these initial observations when combined with his observations of Mr. Wabisca at Goody's are sufficient to establish reasonable grounds.

[18] Cst. Miller made note of what he says were indicators of both fine and gross motor coordination, along with what he says were additional indicia of impairment. However, in my view, there were two problems with Cst. Miller's evidence regarding what he observed at Goody's: firstly, some of what he described as indicia of impairment did not make sense to me as being indicative of impairment; and, secondly, much of what he described that would be indicative of impairment is inconsistent with what is viewed on the video footage, footage he maintained was consistent with his observations.

[19] The observations Cst. Miller considered indicative of impairment, but which are questionable in my view, include the following:

- Mr. Wabisca stood with a "bladed stance", which Cst. Miller explained meant his stance was broader than normal as if he was trying to steady himself. Cst. Miller indicated that this is a symptom of impairment RCMP are trained to observe. However, I have never before had an RCMP member testify to a "bladed stance" being indicative of impairment;
- Mr. Wabisca's eyes were glazed, which Cst. Miller defined as having a blank component to them with perhaps more fluid around the eyes. "There was just a blank or an aura to them", he said. It was unclear to me what was meant by Cst. Miller's description or how a blank stare would be indicative of impairment.
- Mr. Wabisca apparently looked back towards Cst. Miller with a "dipped chin", which Cst. Miller interpreted to mean he was having difficulty holding his head up. However, I fail to see how someone looking over their shoulder with their chin dipped down can be interpreted as meaning they are having difficulty holding up their head let alone how it can be interpreted as indicative of impairment.

[20] In addition to these confusing explanations, which are not, in my view, what one would expect to hear described as indicia of impairment, much of what Cst. Miller described is simply not consistent with the video footage.

[21] Cst. Miller described Mr. Wabisca dipping his chin, swaying, and fumbling with his wallet and card while at the counter making his purchase. During the *voir dire*, the Crown played the video footage before Cst. Miller gave his evidence on his observations inside Goody's. I was struck by the fact that, contrary to Cst. Miller's evidence, I had not observed anything in the footage with respect to Mr. Wabisca's fine or gross motor coordination that I would have described as indicative of impairment. In fairness to the officer, I reserved expressly to re-watch the footage.

[22] Having now had the opportunity to review the Goody's surveillance footage again, I would note that I am satisfied that the officer's evidence is indeed inconsistent with the footage.

[23] Firstly, the dipping of the chin described by the officer and referred to earlier, is not evident at all on the video. Mr. Wabisca does not noticeably dip his chin when he looks back at the Cst. Miller. His chin only dips when he looks down to remove and return his card from and to his wallet. Mr. Wabisca does not have any observable difficulty keeping his head upright.

[24] With respect to the swaying described, for much of Mr. Wabisca's time at the counter, he is standing perfectly still. There is some minor movement which could be described as swaying towards the end of the interaction while he is putting away his

card and receipt, but not to the extent of showing the obvious balance issues described by Cst. Miller.

[25] Similarly, while the view of Mr. Wabisca's hands is not as clear on the video surveillance footage as the officer would have had that evening, the footage does not show any marked difficulty or fumbling.

[26] With respect to Mr. Wabisca's gait, the footage in the store clearly shows that rather than staggering, Mr. Wabisca is walking with an obvious limp in which he is clearly favouring his left leg. However, it must be noted that Cst. Miller was not in the store at the time the footage demonstrates that Mr. Wabisca is limping, and given that my task is to assess the reasonableness of Cst. Miller's belief rather than the accuracy, I do accept that Cst. Miller's long distance view from his parked vehicle would have at least allowed him to discern an abnormality to Mr. Wabisca's gait that could be considered in forming his grounds. One might have hoped that Cst. Miller would have taken more time to observe Mr. Wabisca's gait from closer proximity. Had he done so, I would expect it would have been obvious to him that Mr. Wabisca was limping rather than staggering, but I cannot conclude that his failure to do so means I ought not to consider his earlier observations in assessing the reasonableness of his belief.

[27] Overall, Mr. Wabisca's presentation on the video does not, in my view, demonstrate a departure from normal behaviour suggestive of impairment. This divide between the officer's evidence and the video suggests that the officer at best exaggerated his observations to justify his actions. This exaggeration is particularly concerning when one considers that Cst. Miller formed his belief absent either the smell

of alcohol or an admission of drinking. While it is certainly possible to have a case in which the indicia of impairment are so pronounced that a belief could be said to be reasonable even in the absence of smell of alcohol or other evidence of consumption, this is not that case.

[28] Considering the totality of the evidence, I find that a reasonable person, even with Cst. Miller's knowledge and experience, would conclude that the evidence in this case gives rise, at best, to no more than a suspicion of impairment.

[29] In the result, I am not satisfied that Cst. Miller's belief that Mr. Wabisca's ability to drive was impaired by alcohol was objectively reasonable, and, given my view that he exaggerated some of his observations, I question whether one could even conclude his belief was subjectively held. I find that Mr. Wabisca's s. 9 *Charter* right not to be arbitrarily detained has been violated.

RUDDY C.J.T.C.