

Citation: *Sawrenko (Re)*, 2015 YKTC 53

Date: 20151211
Docket: 15-08561
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

IN THE MATTER of an application by Kory Sawrenko pursuant
to s. 243.1 of the *Motor Vehicles Act*, RSY 2002, c.153

KORY SAWRENKO

Applicant

Appearances:
Lee L. Kirkpatrick
Kory Sawrenko

Counsel for the Territorial Crown
Appearing on own behalf

RULING ON APPLICAITON

[1] Mr. Kory Sawrenko has applied to the Court to seek the release of his motor vehicle from a 30 day impoundment which commenced on November 27, 2015.

[2] On that day, Mr. Sawrenko was a passenger in his vehicle which entered a check-stop in the Porter Creek area of Whitehorse. While speaking to the driver of the vehicle, Cst. Allain detected an odour of alcohol from the vehicle. He asked the driver to step out of the vehicle and, at that time, smelled alcohol from her breath. According to the officer, he noted other signs consistent with alcohol consumption.

[3] He gave the driver a demand to provide a sample of her breath into an Alco sensor approved screening device. She complied and the sample produced a 'fail' result on the machine. The officer ultimately arrested the driver for impaired operation of a motor vehicle and requested she provide samples of her breath into a breathalyzer. She provided two sample of her breath which resulted in samples of 90 mg percent and 80 mg percent, respectively.

[4] Ultimately, the police did not lay a charge of driving over .08. As the breathalyzer technician testified, a police officer has the discretion in such a case to lay a charge. Since the lower of the two readings was not over 80 mg percent, in order to proceed on such a charge, the Crown would have had to lead evidence from a blood alcohol expert extrapolating the readings back to the time of driving. It is not normally the practice to undergo such an expense.

[5] The police did not lay a charge of impaired driving.

Position of the Parties

[6] The Crown argues that since the police officer had reasonable grounds that an offence had been committed contrary to section 253 of the *Criminal Code*, he had the ability to impound the vehicle pursuant to s. 235 of the *Motor Vehicle Act*, RSY 2002, c. 153.

[7] Mr. Sawrenko argues that as no charges were laid pursuant to the *Criminal Code*, continued impoundment of the vehicle cannot be justified.

Analysis

[8] Section 235(1) of the *Motor Vehicle Act* provides that a peace officer who believes on reasonable grounds that a person is driving a motor vehicle on a highway in contravention of s. 253 of the *Criminal Code*, may impound the vehicle.

[9] The Notice of Impoundment form includes a section for the police officer to explain the reason for impoundment. In this case, the investigating officer completed this section by indicating that the vehicle was impounded because the driver was “operating a vehicle while impaired”.

[10] Oddly, there is no part of this section of the form that the officer could check if he believed on reasonable grounds that the driver was driving while his or her blood alcohol level exceeded the legal limit.

[11] This section of the form does include two areas (i.e. boxes) for the officer to indicate the blood alcohol level of the driver. Those boxes were completed by Cst. Allain in this case wherein he indicated breathalyzer test results.

[12] Section 243.1(1) of the *Motor Vehicle Act* states:

A judge of the Territorial Court may, on application by the owner of the motor vehicle order that a motor vehicle be released from impoundment if it is proven on the balance of probabilities that the impoundment cannot be justified under this Part on the basis of true facts that existed at the time the officer decided to impound the vehicle.

[13] The *Criminal Code* sets out two separate and distinct offences to deal with individuals who have operated a motor vehicle after having consumed alcohol. Section 253(1) stipulates that it is an offence for a person to operate a motor vehicle

- (a) while the person's ability to operate the vehicle is impaired by alcohol or drug;
- (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood;

[14] The question to be answered in this matter is whether Mr. Sawrenko has shown on a balance of probabilities that the impoundment cannot be justified. As there is no manner on the Impoundment form for an officer to indicate his or her belief on reasonable grounds that a driver has committed an offence under s. 253 (1)(b) of the *Criminal Code*, I must therefore consider, on a balance of probabilities, the issue of the impairment of the driver's ability to operate a motor vehicle.

[15] The Supreme Court of Canada case of *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 considers the issue of the meaning of impairment in the context of s. 253(1)(a). The Court found that evidence of impairment of the driver's ability to operate a motor vehicle, from slight to great, is sufficient to make out this charge.

[16] In the matter before me, the investigating officer did not observe any issue with respect to the manner the vehicle was being driven. In other words, he did not note that there was any bad driving. In his incident narrative on the Notice of Impoundment form, he indicated that there was an odour of liquor on the driver's breath, her eyes were glossy, and she had slurred speech.

[17] During his examination on this hearing, the officer described an odour of alcohol from her breath, glossy eyes and *slightly* slurred speech.

[18] Based on his training, the officer believed the fail result on the approved screening device indicated a blood alcohol level above 100 mg percent. It should be noted that this is a screening device only and is used solely for that purpose.

[19] As mentioned, the subsequent breathalyzer tests produced readings of 90 mg percent and 80 mg percent, respectively.

[20] There is, however, no evidence before me indicating what these readings signify with respect to the issue of impairment of the driver's ability to operate a motor vehicle. I can understand why this was the case, as the investigating officer, in his testimony, was focused on issues surrounding the approved screening device.

[21] That being said, I am left with what I consider to be minimal indicia of impairment, namely, an odour of liquor from the driver's breath, glossy eyes, and slightly slurred speech. The evidence, as stated, does not demonstrate on a balance of probabilities that the officer had reasonable grounds to believe that the driver's ability to operate a motor vehicle was impaired by alcohol.

[22] As a result, it is my ruling that the impoundment of the motor vehicle in this case cannot be justified and I order that the vehicle be released from impoundment.

CHISHOLM T.C.J.