

Citation: *R. v. Smith*, 2003 YKTC 52

Date: 20030725  
Docket: T.C. 02-00513  
Registry: Whitehorse  
Trial Heard: Carcross

**IN THE TERRITORIAL COURT OF YUKON**  
Before: His Honour Chief Judge Lilles

R e g i n a

v.

Tommy Edward Smith

Appearances:  
David McWhinnie  
Elaine Cairns

Counsel for Crown  
Counsel for Defence

**REASONS FOR JUDGMENT**

[1] The accused, Tommy Smith, was charged with drinking and driving offences (s. 253(b) and s. 253(a) of the *Criminal Code*) as a result of a police investigation on October 26, 2002. A demand was made pursuant to s. 254(3) of the *Code* and Mr. Smith provided two samples of breath into a BAC Datamaster C. Readings of 180 and 170 milligrams of alcohol in 100 millilitres of blood were recorded. At issue is the admissibility of the Certificate of a Qualified Technician Who Took Samples (hereinafter referred to as "Certificate of Analysis"). The accused's position is that the investigating officer did not have reasonable and probable grounds to make the breath demand and that prior to the demand, there was an arbitrary detention and, therefore, the Certificate of Analysis should be excluded.

[2] On October 26, 2002 at approximately 9:40 p.m., Constable Derek Turner, stationed at the Carcross detachment, received a complaint by way of

Whitehorse Telecomns. The bartender at the Caribou Hotel telephoned the police and reported that the accused had backed into another vehicle and that he was too drunk to drive. The accused was identified as driving a black Chevrolet pick-up truck with Yukon licence plates.

[3] Constable Turner had reason to believe that Mr. Smith would be traveling north and while patrolling approximately 30 kms north of Carcross, came over a knoll and observed a vehicle in the distance put on its right-turn signal and pull over to the side of the road. As he drew closer, Constable Turner saw it was a GM black pickup truck with Yukon plates. Constable Turner put on his emergency lights and pulled in behind the truck that had already stopped on its own.

[4] Constable Turner approached the driver's side of the truck and looked in the vehicle. The accused, Tommy Smith, was behind the wheel and a female passenger beside him was holding two open cans of beer. The Constable noted a heavy smell of alcohol emanating from the cab of the truck. Constable Turner told the accused that he was investigating a drinking and driving complaint.

[5] Constable Turner asked Tommy Smith to step out of the car, in part, so that he could check the vehicle for any more open liquor. When Tommy Smith exited the vehicle, Constable Turner said the accused lost his balance and staggered and had to grab on to the doorframe. The accused had problems with his balance walking around the front of the vehicle. Although it was dark, this incident was recorded on police videotape. The illumination came from the patrol car's headlights. In watching the video, the officer verbally confirmed his earlier evidence. My observation was that there was some loss of balance, but I would not describe Mr. Smith's actions as a "heavy stagger". Mr. Smith did keep one hand on the vehicle as he walked around it to the front, possibly for balance. I saw a brief excerpt of the video (less than a minute). The lighting was poor as the video was taken from a distance. Based on my viewing of this excerpt, I am

unable to contradict the officer's testimony that Mr. Smith staggered upon leaving the vehicle and used the vehicle for balance as he walked around it.

[6] When Mr. Smith walked by him upon exiting the vehicle, Constable Turner said he detected a heavy odor of liquor coming from Mr. Smith. Although the officer's notes made no reference to the smell of liquor, his Report to Crown Counsel prepared shortly thereafter included the statement "smell of liquor coming from vehicle".

[7] Constable Turner testified that when asked for his driver's licence, Mr. Smith fumbled with his wallet and dropped something to the ground. At one point, he started to put his wallet back into his pocket, having forgotten to produce his licence. Mr. Smith had to be prompted to produce his licence two or three times. Constable Turner testified that Mr. Smith's speech was slurred, although he was not aware of how Mr. Smith spoke when he was sober.

[8] Upon making these observations, Constable Turner testified that he formed the opinion that Mr. Smith's ability to operate a motor vehicle was impaired by alcohol.

[9] Nevertheless, before making a breath demand pursuant to s. 254(3) of the *Code*, the Constable asked Mr. Smith to perform some roadside sobriety tests. Constable Turner said he asked Mr. Smith to "volunteer" to do the tests. The officer did not provide Mr. Smith the required *Charter* and police warning prior to conducting the test, and based on the current jurisprudence, Crown counsel wisely decided not to introduce the sobriety tests into evidence. I was not told what the tests were or whether the accused passed or failed the tests.

[10] The defence urged me to find that Constable Turner did not form an opinion on Mr. Smith's ability to operate a motor vehicle until after he had observed the sobriety tests. This was denied by Constable Turner. The officer

said that he asked Mr. Smith to volunteer for the tests, and that his purpose for so doing was to practise what he had learned on course earlier that year. The officer also stated that he was not aware that the courts had regularly ruled roadside sobriety tests to be unconstitutional in the absence of certain *Charter* safeguards. I am satisfied that he conducted the tests in good faith.

[11] Constable Turner detained Mr. Smith and placed him in the back of the police vehicle. The officer realized that he could not leave the intoxicated female passenger alone at the scene, and also placed her in the police vehicle in order to take her to Carcross. At 10:32 p.m., while both passengers were in the back of the police vehicle, Constable Turner started to give Mr. Smith his *Charter* rights and to make a breath demand. Constable Turner started reading these from a "card" when Mr. Smith and the female passenger began arguing and fighting such that he could not finish. Constable Turner said there was no point in going further and called Constable Monkman to assist in transporting the female passenger to Carcross. Constable Turner started driving towards Carcross and encountered Constable Monkman on the way to meet him. The female passenger was transferred to Constable Monkman and Constable Turner took Mr. Smith to the detachment.

[12] At the scene, Constable Turner had advised Mr. Smith that he was detained for an impaired driving investigation and that he would be required to give two breath samples. The Constable tried to give the formal breath demand and *Charter* warnings at the scene while the accused and the female passenger were in the back of the police car, but he was unable to do so because of their arguing. As a result, it was not until 10:55 p.m., when they arrived at the detachment, that Constable Turner was able to formally place Mr. Smith under arrest, advise him of his right to counsel and duty counsel, provide access to a telephone, provide the police warning and to make a formal breath demand. I am satisfied that Mr. Smith understood this advice. He declined to exercise his right to contact counsel.

[13] Constable Monkman was the approved technician. He prepared the machine and took two breath samples from Mr. Smith at 23:26 and 23:53 hours. After preparing the Certificate of Analysis, he provided the original Certificate of Analysis to Constable Turner. Later that evening, Constable Turner transported Mr. Smith to Whitehorse to his home.

[14] The facts of this case raise the following issues:

- a) Did Constable Turner have reasonable and probable grounds (without considering the roadside sobriety tests) to make a demand for a breath sample from Mr. Smith pursuant to s. 254(3) of the *Criminal Code*?
- b) Did the continuing detention of Mr. Smith, for the purpose of conducting sobriety tests, constitute arbitrary detention as prohibited by s. 9 of the *Charter*?
- c) Did the failure to advise Mr. Smith of his right to counsel at the roadside and the delay of approximately 25 minutes until they reached the detachment constitute a *Charter* breach? If so, does that breach merit the remedy of excluding the Certificate of Analysis?

[15] **Reasonable and Probable Grounds**: The requirement in s. 254(3) that the police have reasonable and probable grounds before making a breath demand is essential to protect the privacy rights of citizens. It is not only a statutory requirement, but also a constitutional precondition to a lawful search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*. Reasonable and probable grounds have a subjective component, meaning the officer must honestly believe that the suspect has committed the offence. There is also an objective component, in that measured objectively, there must also be reasonable grounds for this belief.

[16] What information or evidence did Constable Turner have to form the basis of reasonable and probable grounds of belief for a breath demand?

[17] In my opinion, the information received from Whitehorse Telecomns of a call from the bartender at the Caribou Hotel of a possible drunk driver in a black Chevrolet pickup truck with Yukon licence plates is not evidence that can be relied upon by Constable Turner. It is essentially information received from an informant. As in the case of an Information to Obtain a Search Warrant, the identity and reliability of the informant must be ascertained before it can be relied upon. This was not done in relation to the alleged call from the bartender. Nevertheless, the information provided was sufficient to justify further investigation by Constable Turner, which he did.

[18] The following observations were made by Constable Turner when he approached the accused's vehicle:

- a) Only the accused and a female passenger were in the vehicle. The female was holding two open cans of beer.
- b) There was a strong smell of liquor coming from the cab, and when Mr. Smith stepped out of the cab, the officer detected a strong smell of liquor on his person.
- c) Upon exiting the vehicle, Mr. Smith lost his balance, staggered and grabbed the doorframe for balance.
- d) The accused kept his hand on the vehicle, possibly for balance, as he walked around the front of the vehicle.
- e) Constable Turner reported a noticeable deficiency in fine motor control when Mr. Smith was asked to produce his driving particulars. Mr. Smith fumbled for his wallet and dropped something to the ground.

- f) Mr. Smith pulled his wallet out and apparently forgot why, and started to put it back in his pocket without producing his licence. He had to be prompted or reminded several times to produce his licence.
- g) Mr. Smith's speech was slurred.

[19] I am satisfied, based on these observations, that Constable Turner had an objective basis for making the breath demand. But, did Constable Turner subjectively believe that Mr. Smith's ability to operate a motor vehicle was impaired by alcohol? The defendant submits that he did not, otherwise Constable Turner would not have asked him to perform additional roadside sobriety tests.

[20] The request to perform additional roadside sobriety tests suggests that Constable Turner needed more evidence to satisfy himself (subjectively) that he had reasonable grounds to make a demand pursuant to s. 254(3). Nevertheless, based on the evidence, I accept Constable Turner's explanation that he had asked Mr. Smith to "volunteer" to do the tests in order to practise what he had recently learned at a training course. The strong symptoms of impairment observed at the scene by Constable Turner are consistent with his explanation of why he conducted the additional tests.

[21] A police officer is not obligated to terminate an investigation when a minimum threshold of evidence is collected. In a "break and enter" investigation, a police officer is not obliged to stop interviewing witnesses or suspects when he or she believes sufficient evidence to justify a conviction has been collected. A proper investigation would require all leads and all reasonably available evidence to be collected. Similarly, in a drinking and driving investigation, an officer is not obligated to terminate the investigation once the lower threshold of evidence justifying a breath demand pursuant to s. 254(3) of the *Code* has been reached. Invariably, as in this case, the officer is also investigating another charge, that of impaired driving, and he or she is entitled to collect all relevant evidence in

relation to it. So even when an officer forms the opinion that a driver's ability to operate a motor vehicle is impaired by alcohol or a drug, he is entitled to continue his investigation. This may include a request that the driver perform roadside sobriety tests. The results of such tests may be admissible provided they have been conducted properly, the appropriate warnings and advice have been given to the driver, and an expert witness is available to testify as to how the driver's performance on the sobriety tests relates to his ability to operate a motor vehicle.

[22] In all of the circumstances, I am satisfied that Constable Turner had reasonable and probable grounds to demand a breath sample from Mr. Smith on the evening of October 26, 2002 prior to asking Mr. Smith to perform the sobriety tests.

[23] **Arbitrary Detention**: The defendant also submitted that the delay that resulted when the officer asked him to perform the sobriety tests was an arbitrary detention and a violation of his s. 9 *Charter* rights. I estimate that any delay that resulted was in the order of five minutes and no more than 10 minutes. Unlike a random stop of a motor vehicle, the defendant in this case was detained for the purpose of conducting sobriety tests because the officer had both subjectively and objectively formed the opinion that his ability to operate a motor vehicle was impaired by alcohol. The officer was entitled to detain the accused.

[24] As stated by the Supreme Court of Canada in *R. v. Storrey*, [1990] 1 S.C.R. 241, an arrest (or detention) lawfully made does not become unlawful simply because the police intend to continue their investigation after the arrest (or detention). In *Storrey, supra*, the accused was detained for some 18 hours until a lineup could be held and a formal charge could be laid. It was held that this delay did not violate the accused's s. 9 *Charter* rights to be free from arbitrary detention. Applying the same principle, the continued detention for 5 to 10 minutes of the defendant in the case at bar for the purpose of continuing the impaired driving investigation did not constitute an arbitrary detention.



[25] **Delay in s. 10(b) Advice:** Section 10(b) of the *Charter* provides that on detention, a person has a right to retain and instruct counsel without delay and to be informed of that right. On the facts of this case, there was a delay in informing Mr. Smith of his s. 10(b) *Charter* right when Constable Turner proceeded to conduct roadside sobriety tests. There was a further delay when Mr. Smith and his female passenger began to argue in the back seat of the police cruiser, just as Constable Turner was beginning to read Mr. Smith his *Charter* rights and police warning. This resulted in Constable Turner calling for additional transport for the female. Mr. Smith was transported to the detachment and given his *Charter* rights, and an opportunity to consult with counsel. This delay was approximately 23 minutes.

[26] The delay resulting from Mr. Smith and the female passenger arguing was outside the officer's control. Mr. Smith was a party to the argument and must therefore assume some responsibility for the resulting delay. Constable Turner met the second cruiser who relieved him of the female passenger about half way to Carcross. Theoretically, Constable Turner could have and should have given Mr. Smith his *Charter* advice at this point. Instead, he continued to the detachment, resulting in a delay of 10 to 12 minutes.

[27] The first delay was due to Constable Turner involving Mr. Smith in roadside sobriety tests. I estimate this delay was in the order of 5 minutes.

[28] The initial delay of 5 minutes was entirely attributable to Constable Turner continuing his investigation. He was entitled to do so. The second delay of 10 to 12 minutes while avoidable, was triggered by the argument between Mr. Smith and his female passenger. Mr. Smith was given his *Charter* advice at the detachment. Mr. Smith declined to contact legal counsel. There was no suggestion that Mr. Smith did not understand his s. 10(b) *Charter* rights. No prejudice was shown to result from the delay.

[29] In these circumstances, the relatively brief delays do not, in my opinion, constitute a s. 10(b) *Charter* breach.

[30] If I am wrong and there is a *Charter* breach, I am of the view that it is not a serious breach, and that the Certificate of Analysis should not be excluded pursuant to s. 24(2) of the *Charter*.

[31] In conclusion, the Certificate of Analysis will be admitted. As the readings were 180 and 170 mg of alcohol in 100 millilitres of blood, I find Mr. Smith guilty of the offence contrary to s. 253(b) of the *Criminal Code*.

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Lilles C.J.T.C.