

Citation: *R. v. Williams*, 2007 YKTC 17

Date: 20061106
Docket: T.C. 06-00021
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

JEFFERY MORGAN PHILLIP WILLIAMS

Appearances:
Kevin Komosky
Gordon Coffin

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Jeffery Williams has been charged with two counts, one contrary to s. 253(a) of the *Code* and one contrary to s. 254(5). The facts in relation to this trial are as follows. Constable Francoeur, along with other members of the RCMP, were operating a check stop on the Alaska Highway. He was advised at 21:40 by an auxiliary member of a truck whose occupants had been consuming alcohol. He was, at that time, dealing with another individual. Approximately five minutes later, he was able to proceed to the vehicle, which was identified as having Mr. Williams in the driver's seat.

[2] At 21:45 he asked to see Mr. Williams' driver's licence, registration and insurance. When Mr. Williams was unable to provide his licence, he was taken to the police vehicle and placed in the back. Sometime later, at 21:54, Constable Francoeur made an ASD demand. At 21:56, Mr. Williams indicated that he was not going to comply with the demand that had been made.

[3] Dealing first with Count 1 of the two counts: Crown has quite rightly conceded that the evidence is insufficient to support a conviction on that count. I would note that the only evidence of impairment, or even remotely related to impairment, is the smell of alcohol and bloodshot eyes. Neither of these, as they are indicative of consumption, are conclusive of impairment, in my view. Count 1 is hereby dismissed.

[4] Count 2 is somewhat more problematic. There is some 14 minutes between the time that Constable Francoeur was advised that Mr. Williams had been stopped and the time that Constable Francoeur makes the ASD demand. Defence argues that as a result of the delay it was not a valid demand pursuant to s. 254. Crown takes the position that the demand was valid as the delay, in this case, is explainable. Both Crown and defence have filed a number of cases in support of their positions.

[5] Section 254 has two requirements which are of importance to this particular case. Firstly, that the officer have a reasonable suspicion that the accused had alcohol in his system. Secondly, the forthwith requirement. On the first of these, I do have some concerns as to whether the officer indeed had formed the requisite suspicion, as he gave somewhat conflicting answers with respect to this particular issue. For instance, he said he made the ASD demand because there was a strong odour of

alcohol coming from the pickup truck and he wanted to determine if it was coming from the accused as well. He later said that the demand was made to determine how much, if any, alcohol was in the accused's system. He agreed, at that point, that there may have been none.

[6] Shortly thereafter, he said that he suspected, given the smell of alcohol on the accused, as well as the accused's admission that he had two drinks, that there was indeed alcohol in his system. I would note, however, that the officer failed to make a notation as to the smell of alcohol coming from the accused in his notes. I do have some concerns with respect to the officer's evidence in this area. Even if I accept that the officer did have the necessary, reasonable suspicion, I still must address the forthwith requirement.

[7] There was a delay, as I noted in this case, of at least some 14 minutes. The question is whether that delay was reasonable and justified in all of the circumstances. I did have the somewhat limited benefit of viewing a videotape with respect to the interaction between Constable Francoeur and Mr. Williams in the police vehicle. I would note that it was extremely difficult to see or hear anything of Mr. Williams during the exchange, but the video does give a sense of what Constable Francoeur was doing during the time period of the delay. Having seen the video, and also having heard the evidence of Constable Francoeur, I would note that in much of the period seen on the video, the officer was seen to be writing. He explained that during these periods of time he was completing his notes as well as several forms.

[8] In assessing the delay in this particular case, I do accept that it is not an inordinately long period of time. The case law does indicate that brief delays may well be acceptable, notwithstanding the forthwith requirement, depending on the facts of a given case. The question for me is whether on the facts of this case, the reason for the delay in making the demand was a reasonable one. I have no difficulty with the five minute delay before the officer was able to get to the vehicle, as I accept that it was reasonable for him to finish processing the individual he was dealing with at the time he received the call.

[9] With respect to the remaining 14 minutes, the questions and answers regarding identity and address are similarly reasonable delays in my view, given that they are necessary to his furtherance of the investigation. Where the difficulty arises is in the time in which the officer, by his own admission, spent writing notes and filling out forms. The notes would have been sketchy at best, given that the officer failed to make note of the only two indicia of alcohol consumption that he now says he observed, that being the smell of alcohol from the accused and bloodshot eyes. Thus, it would appear that more of his time spent writing was spent filling out forms. These, he described as the impoundment form, information for the tow truck and a third form the he could not remember, but which he said was some three pages long.

[10] The difficulty that I have is that there was absolutely no evidence before me which would explain or justify why these forms had to be completed at that time prior to the making of the demand. Indeed, as noted by Mr. Coffin, it makes absolutely no sense for the officer to fill out the noted forms before he has even formed the opinion that Mr. Williams' ability to operate a motor vehicle was impaired by alcohol. I am hard

pressed to see how the delay necessitated to fill out potentially unnecessary forms is at all reasonable.

[11] In the result, I am not satisfied that the delay was justified and, accordingly, the demand was not, in my view, a valid demand pursuant to s. 254. As Mr. Williams need not comply with an invalid demand, the charge of refusal has not been made out.

Count 2 is hereby dismissed as well.

[12] Anything further with respect to this one?

[13] MR. COFFIN: No, Your Honour, thank you.

[14] MR. KOMOSKY: No, Your Honour.

[15] THE COURT: Thank you both.

RUDDY T.C.J.