

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

- v -

**TRAVIS KING**

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Transcript of the Ruling on Voir Dire held before The Honourable Justice K.M. Shaner, sitting in Yellowknife, in the Northwest Territories, on the 13th day of February, 2018.

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**APPEARANCES:**

Mr. J. Potter: Counsel for the Crown  
Mr. T. Pham: Agent for Peter Harte,  
Counsel for the Accused

(Charges under s. 5(2) of the *Controlled Drugs and Substances Act*)

1 THE COURT: Earlier, in January, I heard  
2 an application on behalf of Mr. Travis King to  
3 exclude evidence based on a breach of his rights  
4 under sections 8 and 9 of the *Canadian Charter of*  
5 *Rights and Freedoms*. There was evidence at the  
6 hearing that was provided by Corporal Greg Morrow  
7 and Constable John Newcombe.

8 On May 27th, 2016, there was an accident on  
9 the highway in the vicinity of Kakisa in the  
10 Northwest Territories. The accident occurred  
11 between a pick-up truck and a grey Chevrolet  
12 Malibu with Saskatchewan licence plates, which I  
13 will refer to as the "Malibu". The driver of the  
14 pick-up truck, Mr. Villeneuve, reported the  
15 accident by telephone to the RCMP detachment in  
16 Hay River. He was calling from Enterprise.

17 Corporal Morrow testified that he is the one  
18 who received the call from Mr. Villeneuve. He  
19 took the call directly. He would not have  
20 ordinarily done so, but he said that the  
21 detachment was very busy that day and there were  
22 not enough staff members there to answer the  
23 phones.

24 Corporal Morrow learned from Mr. Villeneuve  
25 that the accident, as I said, occurred just  
26 outside of Kakisa; that the Malibu struck the  
27 pick-up truck from behind; that there were three

1 people in the Malibu; and that following the  
2 collision, Mr. Villeneuve drove himself, his  
3 passenger and the three occupants of the Malibu  
4 to Enterprise from which he made the call to the  
5 RCMP. Enterprise is a community in the Northwest  
6 Territories, which is approximately 40 kilometers  
7 south of Hay River.

8 Corporal Morrow said that after the call  
9 concluded, he contacted Constable John Newcombe  
10 by radio and the two of them left the Hay River  
11 detachment to go to Enterprise to investigate the  
12 collision.

13 Corporal Morrow stated that when he took the  
14 call, he had just returned from his lunch break  
15 which he had at his home. He said his home was  
16 located at the outer south edge of Hay River. As  
17 he was driving back to the detachment, located in  
18 the downtown part of Hay River, he observed  
19 Mr. Max Hyde driving his car in the opposite  
20 direction toward Enterprise. He recognized  
21 Mr. Hyde and his car from previous dealings with  
22 him. At the time Mr. Hyde was a sole occupant in  
23 the car.

24 On the way to Enterprise, Corporal Morrow  
25 and Constable Newcombe observed Mr. Hyde's car  
26 driving towards them in the direction of Hay  
27 River. The radar in the police vehicle indicated

1 Mr. Hyde's car was travelling at 98 kilometers  
2 per hour in a zone which was marked 90 kilometers  
3 per hour. I will pause here to say that Corporal  
4 Morrow testified the zone had a speed limit of 90  
5 kilometers per hour. Constable Newcombe was not  
6 sure if it was 80 or 90 kilometers an hour, but  
7 both conceded that Mr. Hyde was not driving at a  
8 significantly higher speed than that which was  
9 posted.

10 Corporal Morrow observed now that the car  
11 had passengers in it. The police decided they  
12 would pull over Mr. Hyde. Both Corporal Morrow  
13 and Constable Newcombe were asked why they  
14 stopped Mr. Hyde. From the evidence, it appears  
15 a number of factors went into their decision.  
16 First, Mr. Hyde was speeding, albeit not  
17 excessively. Second, Corporal Morrow noted  
18 Mr. Hyde now had passengers in his vehicle. He  
19 said that given that there is "really nothing"  
20 south of Enterprise, he thought the passengers  
21 might be connected to the accident. Third, both  
22 Corporal Morrow and Constable Newcombe had  
23 previous dealings with Mr. Hyde related to, among  
24 other things, nuisance calls for parties and  
25 traffic infractions. Corporal Morrow also  
26 suspected Mr. Hyde was involved in the illegal  
27 drug trade in Hay River. Finally, the police

1 officers had intelligence from the RCMP  
2 suggesting that a car matching the description of  
3 the Malibu involved in the accident was connected  
4 with drug activity in Hay River.

5 Upon exiting the police vehicle after  
6 stopping Mr. Hyde, Constable Newcombe went to the  
7 driver's side of Mr. Hyde's car and Corporal  
8 Morrow went to the passenger side. Corporal  
9 Morrow stated that he did not hear much of the  
10 conversation between Constable Newcombe and the  
11 car's occupants because he was on the other side  
12 of the car. Corporal Morrow was, meanwhile,  
13 talking to the occupants on the passenger side  
14 through an opening in the car window.

15 Constable Newcombe said he advised Mr. Hyde  
16 that he had been stopped for speeding. He asked  
17 him to produce his driver's licence, proof of  
18 insurance and registration. Mr. Hyde complied  
19 with this request. Constable Newcombe also asked  
20 the three passengers for their names as he did  
21 not recognize them. They too complied.

22 The two passengers in the back identified  
23 themselves as Alexander Norwegian and Brandon  
24 Baxandall. The passenger in the front seat was  
25 the accused, Travis King. Corporal Morrow  
26 recognized Mr. Norwegian and Mr. Hyde. He did  
27 not know Mr. King or Mr. Baxandall.

1           Constable Newcombe said he asked all four  
2 occupants if they were involved in the accident.  
3 He said they all denied involvement. He was  
4 unable to recall their exact words and he did not  
5 write them down in his report.

6           Constable Newcombe took the documents from  
7 Mr. Hyde and returned to the police vehicle.  
8 Corporal Morrow stayed on the passenger side of  
9 the car. He spoke to Mr. King through the  
10 passenger window and asked him his name and for  
11 his identification. He also asked Mr. King if he  
12 had been involved in the accident by Kakisa.  
13 Corporal Morrow did not recall precisely what  
14 Mr. King said in response, but he interpreted  
15 Mr. King's response as a denial.

16           Meanwhile, Constable Newcombe called another  
17 officer, Constable Hutchinson, on the radio in  
18 the police vehicle. He knew that Constable  
19 Hutchinson had recently stopped a vehicle that  
20 matched the Malibu's description. From that  
21 conversation, Constable Newcombe learned that  
22 when Constable Hutchinson stopped the Malibu,  
23 Mr. Norwegian was the driver and Mr. Baxandall  
24 was a passenger.

25           Upon returning to Mr. Hyde's vehicle,  
26 Constable Newcombe asked the occupants why they  
27 had lied about the accident. He testified that

1 they maintained their denials. He asked Mr. Hyde  
2 where they had been and Mr. Hyde responded, "the  
3 falls". Constable Newcombe took this to mean  
4 Alexandra Falls, which are south of Enterprise  
5 and in the opposite direction from Kakisa.

6 Constable Newcombe arrested Mr. Norwegian  
7 for obstruction of justice contrary to section  
8 129 of the *Criminal Code*. He conducted a search  
9 of Mr. Norwegian and the search resulted in the  
10 discovery of the registration for a grey  
11 Chevrolet Malibu with Saskatchewan licence  
12 plates. He then placed Mr. Norwegian in the  
13 police vehicle where Mr. Norwegian admitted that  
14 he was driving the Malibu at the time of the  
15 accident and that Mr. Baxandall and Mr. King were  
16 passengers.

17 It is convenient to note at this point that  
18 no issues have been raised about whether any of  
19 Mr. King, Mr. Norwegian or Mr. Baxandall were  
20 properly advised of their rights upon arrest.  
21 That was not in issue.

22 Constable Newcombe left the police vehicle  
23 and told Corporal Morrow what he had learned.  
24 Corporal Morrow testified that he then asked Mr.  
25 King again if he had been involved in the  
26 accident. He was unable to recall the exact  
27 words Mr. King uttered in response, but under

1 cross-examination, he suggested Mr. King may have  
2 said words to the effect of, "No, I was not in  
3 that vehicle", or "I wasn't involved in this.  
4 You've got the wrong person". In any event,  
5 Corporal Morrow interpreted the response as a  
6 denial and he arrested Mr. King and Mr. Baxandall  
7 for obstruction. They were handcuffed and placed  
8 in the police vehicle.

9 Mr. Hyde was arrested as well. He was  
10 handcuffed and told to wait in the ditch on the  
11 side of the road. According to the witnesses,  
12 this was because there was no room for him in the  
13 police vehicle. The officers then searched his  
14 vehicle and they found nothing relating to the  
15 accident. Mr. Hyde was subsequently released and  
16 he was given a ticket for speeding.

17 Meanwhile, a third RCMP officer, Corporal  
18 Scaplen, arrived on the scene, and at Constable  
19 Newcombe's request, he went to Enterprise to  
20 continue the accident investigation.

21 Mr. King, Mr. Baxandall and Mr. Norwegian  
22 were taken to Hay River to the detachment in the  
23 police vehicle.

24 While in the vehicle, Corporal Morrow and  
25 Constable Newcombe both noticed a strong odour of  
26 what they recognized to be "green marijuana",  
27 that is, marijuana that has not been smoked.



1 Both testified that the odour was not present  
2 prior to placing the three detainees into the  
3 vehicle. Constable Newcombe described the odour  
4 as overwhelming. They were unable to determine  
5 the source of the odour immediately.

6 The three detainees were processed when they  
7 arrived at the detachment. Corporal Morrow and  
8 Constable Newcombe were particularly concerned at  
9 that point with finding the source of the green  
10 marijuana odour.

11 Mr. King was the first to be processed. As  
12 part of that, he was asked to remove his clothing  
13 to the first layer. This left him wearing his  
14 shirt, pants and underwear. The police found  
15 nothing at this stage, and still needing to  
16 pinpoint the source of the odour, they moved to a  
17 strip search of Mr. King.

18 Now I will pause to note as well that before  
19 the strip searches began of all three of these  
20 individuals, they were all asked to go down to  
21 the first layer, meaning that they were wearing a  
22 shirt, pants, and the strip search had not begun.  
23 So it was after all three of them had been  
24 searched that they moved to the strip search of  
25 Mr. King.

26 A visual recording of the strip search was  
27 tendered into evidence during this hearing. The

1 search occurred in one of the cells at the  
2 detachment. Corporal Morrow and Constable  
3 Newcombe were both present. The door from the  
4 cell to the hallway was open, although no one  
5 other than the two police officers and Mr. King  
6 was present. Mr. King removed his pants and then  
7 his underwear. His shirt remained on at all  
8 times. A clear plastic bag containing what was  
9 later determined to be crack cocaine was found in  
10 his underwear. His pants and underwear were  
11 returned to him almost immediately and he put  
12 them back on. Mr. King was then charged with  
13 possession for the purpose of trafficking. The  
14 strip search lasted less than two minutes.

15 Mr. Norwegian was processed next in the same  
16 manner, and this led to the discovery of a bag of  
17 marijuana. A strip search was also conducted on  
18 Mr. Baxandall and nothing was recovered. All  
19 three were subsequently taken before a Justice of  
20 the Peace and then released. The obstruction  
21 charge against Mr. King was ultimately stayed.

22 The legal framework in an application to  
23 exclude evidence under section 24 of the *Charter*  
24 is well established. An applicant must first  
25 establish that there has been a *Charter*  
26 violation. If this threshold is not met, that is  
27 the end of the matter. If it is met, then it

1 falls to the applicant to demonstrate that the  
2 evidence was obtained in a manner that infringed  
3 or denied his or her *Charter* rights and that  
4 admitting the evidence would, in all of the  
5 circumstances, bring the administration of  
6 justice into disrepute.

7 Strip searches represent an extreme invasion  
8 of personal dignity and privacy. A strip search  
9 following arrest and in the context of lodging an  
10 accused must be based on reasonable and probable  
11 grounds. Strip searches may not be carried out  
12 as a matter of routine or blanket policy and the  
13 necessity of conducting such a search, given its  
14 invasiveness, must be assessed by the police on a  
15 case by case basis. They must be conducted in a  
16 reasonable manner, and the onus is on the Crown  
17 to demonstrate compliance with these standards.

18 The authority for this is found, of course,  
19 in the case of the *R v Golden*, 2001 SCC 83, and  
20 as well in *R v Coulter*, 20 OJ 3452 and 2000  
21 CarswellOnt 2972.

22 At the hearing defence counsel, Mr. Harte,  
23 conceded that the initial traffic stop was  
24 authorized under the terms of the Northwest  
25 Territories *Motor Vehicles Act*, RSNWT 1988  
26 c. M-16. His argument was that there were not  
27 reasonable and probable grounds to arrest

1 Mr. King for obstruction in the first place and  
2 therefore the ensuing search violated his right  
3 to freedom from unreasonable search and seizure  
4 under section 8 of the *Charter*.

5 That narrows the issues to these: First,  
6 were there reasonable and probable grounds to  
7 arrest Mr. King for obstruction?; second, did the  
8 strip search to which Mr. King was subjected  
9 comply with the constitutional requirements?; and  
10 third, if the answer to either or both of these  
11 is no and Mr. King's *Charter* rights were  
12 violated, should the cocaine be excluded from  
13 evidence?

14 Turning to the first issue, the defence  
15 arguments on this question focussed on the  
16 elements of the offence of obstruction under  
17 section 129 of the *Criminal Code* and whether they  
18 were present when the arrest occurred.

19 Mr. Harte submitted that lying to the police  
20 does not, by itself, equate to obstruction. It  
21 is also necessary that the police are misled,  
22 that is, obstructed, by the lie. He reasoned  
23 that because the police were confident that  
24 Mr. King and the two other passengers were  
25 involved in the accident that they were  
26 investigating, Mr. King's denial did not mislead  
27 the police. Moreover, the extra work involved as

1 a result of Mr. King's denial, that is Constable  
2 Newcombe's radio conversation with Constable  
3 Hutchinson and the fact that a third officer  
4 wound up going to Enterprise to continue the  
5 investigation into the accident, was of  
6 insignificant consequence. He also emphasized  
7 that the obstruction charge against Mr. King was  
8 ultimately stayed.

9 The case of *R v Khan*, 2014 ONSC 6541, which  
10 is a summary conviction appeal, was cited in  
11 support of the defence position. The issue there  
12 was whether an action that had a trivial effect  
13 on the execution of a police officer's duty was  
14 sufficient to find an accused guilty of  
15 obstruction and, in particular, the applicability  
16 of what is termed the *de minimis* principle in  
17 that determination.

18 Justice Dawson embarked on a thorough  
19 discussion of, among other things, the elements  
20 of obstruction, the *de minimis* principle and its  
21 application in various contexts. He also  
22 canvassed case law from a number of jurisdictions  
23 throughout Canada where the meaning of  
24 obstruction has been considered. Among his  
25 conclusions was this: (at paragraph 71)

26 I agree with these comments and with  
27 the comments of Robertson J. in

1            *Walcott* at paragraph 35, that the  
2            words of Spence J. in *Moore* cannot be  
3            taken as requiring the Crown to prove  
4            "a major inconvenience" to the police  
5            in order to establish an obstruction  
6            pursuant to s. 129(a) of the *Criminal*  
7            *Code*. However, I remain of the view  
8            that it does not follow that the *de*  
9            *minimis* principle has no application  
10           where the effect of the obstructive  
11           conduct on the execution of the  
12           police officer's duty was so minor or  
13           trivial that it falls within the *de*  
14           *minimis* range. It goes too far, in  
15           my view, to say that any effect on  
16           the execution of the police officer's  
17           duty, no matter how trivial or  
18           insignificant, is sufficient to  
19           establish the second essential  
20           element of the offence.

21           While I accept all this, respectfully, I find  
22           that the argument advanced on behalf of Mr. King  
23           cannot succeed. That is because it conflates  
24           what is required to sustain a conviction with  
25           what is required to establish reasonable and  
26           probable grounds for an arrest.

27           Securing a conviction requires that a court

1 of competent jurisdiction, after hearing and  
2 considering all of the evidence, be satisfied  
3 beyond a reasonable doubt of each element of the  
4 offence. This is the context in which the  
5 analytical framework in *Khan* and other cases  
6 respecting whether there was actual obstruction  
7 would be relevant.

8 By contrast, an arresting officer is not  
9 required to have evidence sufficient to sustain a  
10 conviction, nor evidence that establishes a *prima*  
11 *facie* case, and the authority for that is found  
12 in *R v Storrey* 1990 1 SCR 241, in paragraphs 15  
13 to 17. A lawful arrest without warrant requires  
14 first, that the arresting officer believes  
15 subjectively that the person to be arrested has  
16 committed or is about to commit an indictable  
17 offence; and second, that the grounds for the  
18 arrest are objectively justifiable in that a  
19 reasonable person in the shoes of the police  
20 officer, taking into consideration the officer's  
21 training and experience, would conclude that  
22 there were reasonable grounds for the arrest.

23 I am satisfied from his evidence that  
24 Corporal Morrow subjectively believed Mr. King's  
25 action in denying involvement in the accident  
26 amounted to obstruction. In cross-examination he  
27 was asked how Mr. King's denial obstructed the

1 accident investigation. His response was that he  
2 believed Mr. King deliberately provided false  
3 information designed to deflect suspicion from  
4 himself. Corporal Morrow was unshaken in this  
5 under cross-examination.

6 Turning to the more complex question of  
7 whether the arrest was objectively justifiable,  
8 the circumstances which presented themselves to  
9 Corporal Morrow with respect to Mr. King were  
10 these: first, Mr. King was asked if he was  
11 involved in the accident. He denied that he was  
12 and then Mr. Norwegian was arrested. Mr.  
13 Norwegian admitted to being the driver of the car  
14 involved in the accident and he told Constable  
15 Newcombe that Mr. King was, indeed, one of the  
16 passengers. As well, Constable Newcombe, upon  
17 searching Mr. Norwegian at the scene, found the  
18 registration for a grey Chevrolet Malibu with  
19 Saskatchewan licence plates which matched the  
20 description of the car provided by  
21 Mr. Villeneuve. Constable Newcombe imparted all  
22 of this information to Corporal Morrow who asked  
23 Mr. King, again, if he was involved in the  
24 accident and Mr. King, again, denied it.

25 A reasonable person in the position of a  
26 police officer with training in investigation and  
27 law enforcement would, in my view, upon being



1 presented with these circumstances conclude that  
2 Mr. King was, indeed, trying to steer the  
3 investigation away from himself, thus obstructing  
4 the accident investigation. The arrest was  
5 objectively justifiable.

6 Before leaving this, it is important to also  
7 discuss the fact that the charge of obstruction  
8 was ultimately stayed. In my view that is a red  
9 herring. The Crown can stay charges for a  
10 variety of reasons and that is generally not  
11 reviewable by the Court. So, for the foregoing  
12 reasons, I find that Corporal Morrow had  
13 reasonable and probable grounds to arrest  
14 Mr. King and, accordingly, that arrest was  
15 lawful.

16 That brings us to the issue of whether the  
17 strip search to which Mr. King was subjected  
18 complied with the Constitutional requirements,  
19 and I find that it did. The police had  
20 reasonable and probable grounds to conduct the  
21 strip search following the arrest. It was not  
22 carried out to punish or humiliate Mr. King or  
23 the others. It was carried out for a specific  
24 and legitimate purpose prompted by the odour of  
25 green marijuana and it was conducted in a  
26 reasonable manner. It was not a fishing  
27 expedition, nor was the strip search conducted as

1 part of a blanket police policy.

2 Both of the police officers testified,  
3 again, that there was a strong odour of green  
4 marijuana in the police vehicle following the  
5 arrests. That odour had not been present before  
6 they placed the three accused in the vehicle and  
7 this led them each to believe that one or more of  
8 the three of Mr. Baxandall, Mr. Norwegian or  
9 Mr. King was in possession of marijuana.

10 The police conducted the first layer search  
11 which did not reveal the source of the odour from  
12 any of the three. Thus, they believed that they  
13 needed to proceed to the strip search to  
14 determine the source.

15 A strong odour of marijuana emanating from  
16 an individual or individuals who are about to be  
17 lodged in cells would give rise to legitimate  
18 concern. Faced with that, it would have been  
19 entirely unreasonable for the police to ignore it  
20 and do nothing. Finally, the strip search was  
21 conducted in a manner consistent with the  
22 guidelines set out in *Golden* at paragraph 101.  
23 Among other things, it was carried out in a  
24 private setting. Mr. King was permitted to  
25 remove his own clothing and he was not touched in  
26 any manner by either officer during the search.  
27 It was not prolonged, lasting less than two

1 minutes. It proceeded in a way that Mr. King was  
2 never fully undressed and it was conducted with  
3 only the two arresting officers present.  
4 Accordingly, the strip search conducted on  
5 Mr. King was reasonable and the discovery of  
6 cocaine incidental to this.

7 In conclusion, I find that there was no  
8 violation of Mr. King's rights under section 8 of  
9 the *Charter* and, accordingly, the application to  
10 exclude the evidence is dismissed.

11 -----

12 **CERTIFICATE OF TRANSCRIPT**

13

14 I, the undersigned, hereby certify that the  
15 foregoing pages are a complete and accurate  
16 transcript of the proceedings taken down by me in  
17 shorthand and transcribed from my shorthand notes  
18 to the best of my skill and ability.

19 Dated at the City of Edmonton, Province of  
20 Alberta, this 1st day of July, 2018.

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25

Colleen Rea

26

Court Reporter

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