*R v King*, 2018 NWTSC 33 **S-1-CR-2016-000111**

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**TRAVIS KING**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** 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
28. people in the Malibu; and that following the
29. collision, Mr. Villeneuve drove himself, his
30. passenger and the three occupants of the Malibu
31. to Enterprise from which he made the call to the
32. RCMP. Enterprise is a community in the Northwest
33. Territories, which is approximately 40 kilometers
34. south of Hay River.
35. Corporal Morrow said that after the call
36. concluded, he contacted Constable John Newcombe
37. by radio and the two of them left the Hay River
38. detachment to go to Enterprise to investigate the
39. collision.
40. Corporal Morrow stated that when he took the
41. call, he had just returned from his lunch break
42. which he had at his home. He said his home was
43. located at the outer south edge of Hay River. As
44. he was driving back to the detachment, located in
45. the downtown part of Hay River, he observed
46. Mr. Max Hyde driving his car in the opposite
47. direction toward Enterprise. He recognized
48. Mr. Hyde and his car from previous dealings with
49. him. At the time Mr. Hyde was a sole occupant in
50. the car.
51. On the way to Enterprise, Corporal Morrow
52. and Constable Newcombe observed Mr. Hyde's car
53. driving towards them in the direction of Hay
54. River. The radar in the police vehicle indicated
55. Mr. Hyde's car was travelling at 98 kilometers
56. per hour in a zone which was marked 90 kilometers
57. per hour. I will pause here to say that Corporal
58. Morrow testified the zone had a speed limit of 90
59. kilometers per hour. Constable Newcombe was not
60. sure if it was 80 or 90 kilometers an hour, but
61. both conceded that Mr. Hyde was not driving at a
62. significantly higher speed than that which was
63. posted.
64. Corporal Morrow observed now that the car
65. had passengers in it. The police decided they
66. would pull over Mr. Hyde. Both Corporal Morrow
67. and Constable Newcombe were asked why they
68. stopped Mr. Hyde. From the evidence, it appears
69. a number of factors went into their decision.
70. First, Mr. Hyde was speeding, albeit not
71. excessively. Second, Corporal Morrow noted
72. Mr. Hyde now had passengers in his vehicle. He
73. said that given that there is "really nothing"
74. south of Enterprise, he thought the passengers
75. might be connected to the accident. Third, both
76. Corporal Morrow and Constable Newcombe had
77. previous dealings with Mr. Hyde related to, among
78. other things, nuisance calls for parties and
79. traffic infractions. Corporal Morrow also
80. suspected Mr. Hyde was involved in the illegal
81. drug trade in Hay River. Finally, the police
82. officers had intelligence from the RCMP
83. suggesting that a car matching the description of
84. the Malibu involved in the accident was connected
85. with drug activity in Hay River.
86. Upon exiting the police vehicle after
87. stopping Mr. Hyde, Constable Newcombe went to the
88. driver's side of Mr. Hyde's car and Corporal
89. Morrow went to the passenger side. Corporal
90. Morrow stated that he did not hear much of the
91. conversation between Constable Newcombe and the
92. car's occupants because he was on the other side
93. of the car. Corporal Morrow was, meanwhile,
94. talking to the occupants on the passenger side
95. through an opening in the car window.
96. Constable Newcombe said he advised Mr. Hyde
97. that he had been stopped for speeding. He asked
98. him to produce his driver's licence, proof of
99. insurance and registration. Mr. Hyde complied
100. with this request. Constable Newcombe also asked
101. the three passengers for their names as he did
102. not recognize them. They too complied.
103. The two passengers in the back identified
104. themselves as Alexander Norwegian and Brandon
105. Baxandall. The passenger in the front seat was
106. the accused, Travis King. Corporal Morrow
107. recognized Mr. Norwegian and Mr. Hyde. He did
108. 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
109. they maintained their denials. He asked Mr. Hyde
110. where they had been and Mr. Hyde responded, "the
111. falls". Constable Newcombe took this to mean
112. Alexandra Falls, which are south of Enterprise
113. and in the opposite direction from Kakisa.
114. Constable Newcombe arrested Mr. Norwegian
115. for obstruction of justice contrary to section
116. 129 of the *Criminal Code*. He conducted a search
117. of Mr. Norwegian and the search resulted in the
118. discovery of the registration for a grey
119. Chevrolet Malibu with Saskatchewan licence
120. plates. He then placed Mr. Norwegian in the
121. police vehicle where Mr. Norwegian admitted that
122. he was driving the Malibu at the time of the
123. accident and that Mr. Baxandall and Mr. King were
124. passengers.
125. It is convenient to note at this point that
126. no issues have been raised about whether any of
127. Mr. King, Mr. Norwegian or Mr. Baxandall were
128. properly advised of their rights upon arrest.
129. That was not in issue.
130. Constable Newcombe left the police vehicle
131. and told Corporal Morrow what he had learned.
132. Corporal Morrow testified that he then asked Mr.
133. King again if he had been involved in the
134. accident. He was unable to recall the exact
135. words Mr. King uttered in response, but under
136. cross-examination, he suggested Mr. King may have
137. said words to the effect of, "No, I was not in
138. that vehicle", or "I wasn't involved in this.
139. You've got the wrong person". In any event,
140. Corporal Morrow interpreted the response as a
141. denial and he arrested Mr. King and Mr. Baxandall
142. for obstruction. They were handcuffed and placed
143. in the police vehicle.
144. Mr. Hyde was arrested as well. He was
145. handcuffed and told to wait in the ditch on the
146. side of the road. According to the witnesses,
147. this was because there was no room for him in the
148. police vehicle. The officers then searched his
149. vehicle and they found nothing relating to the
150. accident. Mr. Hyde was subsequently released and
151. he was given a ticket for speeding.
152. Meanwhile, a third RCMP officer, Corporal
153. Scaplen, arrived on the scene, and at Constable
154. Newcombe's request, he went to Enterprise to
155. continue the accident investigation.
156. Mr. King, Mr. Baxandall and Mr. Norwegian
157. were taken to Hay River to the detachment in the
158. police vehicle.
159. While in the vehicle, Corporal Morrow and
160. Constable Newcombe both noticed a strong odour of
161. what they recognized to be "green marijuana",
162. that is, marijuana that has not been smoked.
163. Both testified that the odour was not present
164. prior to placing the three detainees into the
165. vehicle. Constable Newcombe described the odour
166. as overwhelming. They were unable to determine
167. the source of the odour immediately.
168. The three detainees were processed when they
169. arrived at the detachment. Corporal Morrow and
170. Constable Newcombe were particularly concerned at
171. that point with finding the source of the green
172. marijuana odour.
173. Mr. King was the first to be processed. As
174. part of that, he was asked to remove his clothing
175. to the first layer. This left him wearing his
176. shirt, pants and underwear. The police found
177. nothing at this stage, and still needing to
178. pinpoint the source of the odour, they moved to a
179. strip search of Mr. King.
180. Now I will pause to note as well that before
181. the strip searches began of all three of these
182. individuals, they were all asked to go down to
183. the first layer, meaning that they were wearing a
184. shirt, pants, and the strip search had not begun.
185. So it was after all three of them had been
186. searched that they moved to the strip search of
187. Mr. King.
188. A visual recording of the strip search was
189. tendered into evidence during this hearing. The
190. search occurred in one of the cells at the
191. detachment. Corporal Morrow and Constable
192. Newcombe were both present. The door from the
193. cell to the hallway was open, although no one
194. other than the two police officers and Mr. King
195. was present. Mr. King removed his pants and then
196. his underwear. His shirt remained on at all
197. times. A clear plastic bag containing what was
198. later determined to be crack cocaine was found in
199. his underwear. His pants and underwear were
200. returned to him almost immediately and he put
201. them back on. Mr. King was then charged with
202. possession for the purpose of trafficking. The
203. strip search lasted less than two minutes.
204. Mr. Norwegian was processed next in the same
205. manner, and this led to the discovery of a bag of
206. marijuana. A strip search was also conducted on
207. Mr. Baxandall and nothing was recovered. All
208. three were subsequently taken before a Justice of
209. the Peace and then released. The obstruction
210. charge against Mr. King was ultimately stayed.
211. The legal framework in an application to
212. exclude evidence under section 24 of the *Charter*
213. is well established. An applicant must first
214. establish that there has been a *Charter*
215. violation. If this threshold is not met, that is
216. the end of the matter. If it is met, then it
217. falls to the applicant to demonstrate that the
218. evidence was obtained in a manner that infringed
219. or denied his or her *Charter* rights and that
220. admitting the evidence would, in all of the
221. circumstances, bring the administration of
222. justice into disrepute.
223. Strip searches represent an extreme invasion
224. of personal dignity and privacy. A strip search
225. following arrest and in the context of lodging an
226. accused must be based on reasonable and probable
227. grounds. Strip searches may not be carried out
228. as a matter of routine or blanket policy and the
229. necessity of conducting such a search, given its
230. invasiveness, must be assessed by the police on a
231. case by case basis. They must be conducted in a
232. reasonable manner, and the onus is on the Crown
233. to demonstrate compliance with these standards.
234. The authority for this is found, of course,
235. in the case of the *R v Golden*, 2001 SCC 83, and
236. as well in *R v Coulter,* 20 OJ 3452 and 2000
237. CarswellOnt 2972.
238. At the hearing defence counsel, Mr. Harte,
239. conceded that the initial traffic stop was
240. authorized under the terms of the Northwest
241. Territories *Motor Vehicles Act*, RSNWT 1988
242. c. M-16. His argument was that there were not
243. reasonable and probable grounds to arrest
244. Mr. King for obstruction in the first place and
245. therefore the ensuing search violated his right
246. to freedom from unreasonable search and seizure
247. under section 8 of the *Charter*.
248. That narrows the issues to these: First,
249. were there reasonable and probable grounds to
250. arrest Mr. King for obstruction?; second, did the
251. strip search to which Mr. King was subjected
252. comply with the constitutional requirements?; and
253. third, if the answer to either or both of these
254. is no and Mr. King's *Charter* rights were
255. violated, should the cocaine be excluded from
256. evidence?
257. Turning to the first issue, the defence
258. arguments on this question focussed on the
259. elements of the offence of obstruction under
260. section 129 of the *Criminal Code* and whether they
261. were present when the arrest occurred.
262. Mr. Harte submitted that lying to the police
263. does not, by itself, equate to obstruction. It
264. is also necessary that the police are misled,
265. that is, obstructed, by the lie. He reasoned
266. that because the police were confident that
267. Mr. King and the two other passengers were
268. involved in the accident that they were
269. investigating, Mr. King's denial did not mislead
270. the police. Moreover, the extra work involved as
271. a result of Mr. King's denial, that is Constable
272. Newcombe's radio conversation with Constable
273. Hutchinson and the fact that a third officer
274. wound up going to Enterprise to continue the
275. investigation into the accident, was of
276. insignificant consequence. He also emphasized
277. that the obstruction charge against Mr. King was
278. ultimately stayed.
279. The case of *R v Khan*, 2014 ONSC 6541, which
280. is a summary conviction appeal, was cited in
281. support of the defence position. The issue there
282. was whether an action that had a trivial effect
283. on the execution of a police officer's duty was
284. sufficient to find an accused guilty of
285. obstruction and, in particular, the applicability
286. of what is termed the *de minimis* principle in
287. that determination.
288. Justice Dawson embarked on a thorough
289. discussion of, among other things, the elements
290. of obstruction, the *de minimis* principle and its
291. application in various contexts. He also
292. canvassed case law from a number of jurisdictions
293. throughout Canada where the meaning of
294. obstruction has been considered. Among his
295. conclusions was this: (at paragraph 71)
296. I agree with these comments and with
297. the comments of Robertson J. in
298. *Walcott* at paragraph 35, that the
299. words of Spence J. in *Moore* cannot be
300. taken as requiring the Crown to prove
301. "a major inconvenience" to the police
302. in order to establish an obstruction
303. pursuant to s. 129(a) of the *Criminal*
304. *Code*. However, I remain of the view
305. that it does not follow that the *de*
306. *minimis* principle has no application
307. where the effect of the obstructive
308. conduct on the execution of the
309. police officer's duty was so minor or
310. trivial that it falls within the *de*
311. *minimis* range. It goes too far, in
312. my view, to say that any effect on
313. the execution of the police officer's
314. duty, no matter how trivial or
315. insignificant, is sufficient to
316. establish the second essential
317. element of the offence.
318. While I accept all this, respectfully, I find
319. that the argument advanced on behalf of Mr. King
320. cannot succeed. That is because it conflates
321. what is required to sustain a conviction with
322. what is required to establish reasonable and
323. probable grounds for an arrest.
324. 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
325. accident investigation. His response was that he
326. believed Mr. King deliberately provided false
327. information designed to deflect suspicion from
328. himself. Corporal Morrow was unshaken in this
329. under cross-examination.
330. Turning to the more complex question of
331. whether the arrest was objectively justifiable,
332. the circumstances which presented themselves to
333. Corporal Morrow with respect to Mr. King were
334. these: first, Mr. King was asked if he was
335. involved in the accident. He denied that he was
336. and then Mr. Norwegian was arrested. Mr.
337. Norwegian admitted to being the driver of the car
338. involved in the accident and he told Constable
339. Newcombe that Mr. King was, indeed, one of the
340. passengers. As well, Constable Newcombe, upon
341. searching Mr. Norwegian at the scene, found the
342. registration for a grey Chevrolet Malibu with
343. Saskatchewan licence plates which matched the
344. description of the car provided by
345. Mr. Villeneuve. Constable Newcombe imparted all
346. of this information to Corporal Morrow who asked
347. Mr. King, again, if he was involved in the
348. accident and Mr. King, again, denied it.
349. A reasonable person in the position of a
350. police officer with training in investigation and
351. law enforcement would, in my view, upon being
352. presented with these circumstances conclude that
353. Mr. King was, indeed, trying to steer the
354. investigation away from himself, thus obstructing
355. the accident investigation. The arrest was
356. objectively justifiable.
357. Before leaving this, it is important to also
358. discuss the fact that the charge of obstruction
359. was ultimately stayed. In my view that is a red
360. herring. The Crown can stay charges for a
361. variety of reasons and that is generally not
362. reviewable by the Court. So, for the foregoing
363. reasons, I find that Corporal Morrow had
364. reasonable and probable grounds to arrest
365. Mr. King and, accordingly, that arrest was
366. lawful.
367. That brings us to the issue of whether the
368. strip search to which Mr. King was subjected
369. complied with the Constitutional requirements,
370. and I find that it did. The police had
371. reasonable and probable grounds to conduct the
372. strip search following the arrest. It was not
373. carried out to punish or humiliate Mr. King or
374. the others. It was carried out for a specific
375. and legitimate purpose prompted by the odour of
376. green marijuana and it was conducted in a
377. reasonable manner. It was not a fishing
378. expedition, nor was the strip search conducted as
379. part of a blanket police policy.
380. Both of the police officers testified,
381. again, that there was a strong odour of green
382. marijuana in the police vehicle following the
383. arrests. That odour had not been present before
384. they placed the three accused in the vehicle and
385. this led them each to believe that one or more of
386. the three of Mr. Baxandall, Mr. Norwegian or
387. Mr. King was in possession of marijuana.
388. The police conducted the first layer search
389. which did not reveal the source of the odour from
390. any of the three. Thus, they believed that they
391. needed to proceed to the strip search to
392. determine the source.
393. A strong odour of marijuana emanating from
394. an individual or individuals who are about to be
395. lodged in cells would give rise to legitimate
396. concern. Faced with that, it would have been
397. entirely unreasonable for the police to ignore it
398. and do nothing. Finally, the strip search was
399. conducted in a manner consistent with the
400. guidelines set out in *Golden* at paragraph 101.
401. Among other things, it was carried out in a
402. private setting. Mr. King was permitted to
403. remove his own clothing and he was not touched in
404. any manner by either officer during the search.
405. It was not prolonged, lasting less than two
406. minutes. It proceeded in a way that Mr. King was
407. never fully undressed and it was conducted with
408. only the two arresting officers present.
409. Accordingly, the strip search conducted on
410. Mr. King was reasonable and the discovery of
411. cocaine incidental to this.
412. In conclusion, I find that there was no
413. violation of Mr. King's rights under section 8 of
414. the *Charter* and, accordingly, the application to
415. exclude the evidence is dismissed.

# 11 -----------------------------------------------------

12 **CERTIFICATE OF TRANSCRIPT**

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1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 1st day of July, 2018.

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1. Colleen Rea
2. Court Reporter

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