

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROBERT JOHN McFADDEN

Corrected judgment: A corrigendum was issued on November 9, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

Heard at: Yellowknife, Northwest Territories
Date of Decision: October 21, 2016
Date of Trial: June 22, 2016, September 1-2, 2016
Counsel for the Crown: Annie Piché
Counsel for the Accused: Peter Harte

[Section 129(a) of the *Criminal Code*]

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROBERT JOHN McFADDEN

A. INTRODUCTION

A.1 Charge and Background

[1] Mr. McFadden is charged with obstructing three police officers engaged in a criminal investigation.

[2] In the early morning hours of July 5, 2015, the police were searching a parked cargo van because it had a stolen Alberta licence plate. There were four police officers involved in the search. The accused, John McFadden stepped out of a local pub to have a cigarette and noticed the two police vehicles with activated emergency lights near the van and blocking a lane of traffic. Mr. McFadden was a reporter with the local newspaper. He ran the half block to where the van was parked. He interacted briefly with the RCMP. He then went back to the pub to get car keys and to a parking lot to get his camera.

[3] Mr. McFadden took a series of photographs of the police officers and the van. There were two doors on the passenger side of the van which opened outwards and which provided access to the cargo area behind the front seats. Mr. McFadden took a photograph of the interior of the cargo van through the space created by the open doors. Mr. McFadden was arrested for obstruction of a peace officer within seconds of taking this photograph. The arresting officer felt that he had been obstructed because he had to stop his search in order to remove Mr. McFadden from the van and he did not know if the search had been compromised by Mr. McFadden putting something in the van or removing something.

A.2 Conduct of the Trial

[1] The charge against Mr. McFadden as it appears on the Information is as follows:

On or about the 5th day of July, 2015 at or near the City of Yellowknife in the Northwest Territories did wilfully obstruct, Christopher HIPOLITO, Kevin SALES, and Christopher WATSON peace officers to wit members of the Royal Canadian Mounted Police engaged in the execution of their duty a criminal investigation by interfering with an investigation, contrary to section 129(a) of the *Criminal Code*.

[2] At the commencement of the trial, the accused admitted the date, time and location of the incident, being just after midnight on July 5, 2015 in Yellowknife, Northwest Territories, the jurisdiction of the Court and that he was the person involved.

[3] The Crown called three police witnesses: Christopher Watson, Christopher Hipolito and Kevin Sales.

[4] At the beginning of the case for the Defence, counsel provided the Court with an Agreed Statement of Facts dealing with the exact times when the photographs in Exhibit 3 were taken. The Defence called Sarah Heaton and John McFadden as witnesses.

[5] In the decision that follows, reference to a section number in the absence of the name of the legislation is a reference to the *Criminal Code*, R.S.C. 1985, c.C-46, as amended.

A.3 The Theory of the Crown and of the Defence

[6] The Crown submits that at the time of the event, John McFadden was intoxicated. He yelled and swore at the police officers when he was told to stay back from the van. His relationship with the police was poor since he, in his role as a reporter, had previously been refused entry to an RCMP press conference. Mr. McFadden was angry because of this refusal and because of the way he was being treated by the RCMP that night. Consequently, he used the pretext of taking photographs to either willfully obstruct the police investigation or at the very least, was reckless as to whether his actions would obstruct the police officers in the execution of their duty.

[7] The Defence submits that at the time of the event, John McFadden was not intoxicated. He observed an event which he thought had the potential to be news worthy and was taking photographs in the hope that he could use them in his job as a reporter. Mr. McFadden thought his relationship with the RCMP had been repaired. He was frustrated with their behaviour at the scene, not angry, and the

only time he swore at them, was under his breath. Mr. McFadden felt that he was taking photographs within the confines of the directions that the police had given him. He denies that any part of his body or his camera entered the van.

A.4 Issues

[8] In order to determine whether the Crown has proven the case against Mr. McFadden it is necessary to provide an overview of the law regarding obstruction of a peace officer, make certain factual determinations and then, in the context of these factual determinations, made certain legal determinations.

[9] Following the overview of the law, the following factual issues will be examined:

- (a) What was Mr. McFadden's level of intoxication?
- (b) Was Mr. McFadden yelling and swearing?
- (c) What instructions were given to Mr. McFadden regarding where he could be in relation to the van and the police officers?
- (d) Did part of Mr. McFadden's body or his camera enter the van?

[10] The following legal issues will then be examined:

- (a) Did Mr. McFadden's actions constitute an obstruction?
- (b) Were the police officers engaged in the execution of their duty?
- (c) Did Mr. McFadden have the requisite *mens rea*?

B. LEGAL FRAMEWORK

B.1 Section 129(a)

[11] The relevant portion of section 129(a) of the *Criminal Code* states:

129. Every one who

- (a) . . . wilfully obstructs a peace officer in the execution of his duty

is guilty of

- (e) an offence punishable on summary conviction.

[12] The Alberta Court of Appeal in *R. v. Gunn* [1997], A.J. No. 44 identified three elements as being necessary in order to prove the commission of an offence under section 129(a):

17 Three elements must be proven:

1. there was an obstruction;
2. the Constable, a peace officer, was in the execution of her duty;
3. the person obstructing did so wilfully.

R. v. Ure (1976), 6 A.R. 193 (Alta Q.B.); *R. v. Westlie* (1971), 2 C.C.C. (2d) 315 (B.C.C.A.). The first two elements relate to the accused's conduct or *actus reus*, whereas the third requirement relates to his intent or *mens rea*.

[13] The key phrase in section 129(a) with respect to this case is “wilfully obstructs”. This phrase asks and, in part, answers two questions. First, what is the threshold over which an action by an accused with respect to a peace officer becomes “obstruction?” Second, what is the *mens rea* required of an accused to “wilfully obstruct?”

[14] If a peace officer is in the execution of his duty, it is clear that an act by the accused which *prevents* the peace officer from executing his duty is obstruction. At the other end of the spectrum, there are acts which have little effect on the peace officer's job except to momentarily cause the officer to pause. Surely, these do not meet the threshold. An example would be a bicyclist who rings his bell as he passes a police officer writing a speeding ticket on the side of the road and causes the police officer to look up. At what point on this spectrum do an accused's actions amount to obstruction?

[15] The *Criminal Code* does not define “obstruct”. We are left to rely on the plain meaning and the case law. The *Black's Law Dictionary* definition of “obstruct” is “To impede; to interpose impediments to the hindrance or frustration of some act or service, as to obstruct an officer in the execution of his duty.” This definition has been cited in *R. v. Soltys* (1980), 56 C.C.C. (2d) at para. 11 (B.C.C.A) and *R. v. Platten*, 2000 ABPC 11 at para. 16.

[16] Another frequently used definition is that from *Hinchliffe v. Sheldon*, [1955] 3 All E.R. 406 at 408:

“Obstructing” means, for this purpose, making it more difficult for the police to carry out their duties.”

[17] This definition was adopted by the Ontario Court of Appeal in *R. v. Tortolano* [1975] O.J. No. 1055 and by Justice Paciocco in *R. v. Yussuf*, [2014] O.J. No. 1487.

[18] Neither of these definitions answers definitively the question of threshold since many innocent interactions between police and citizens can “make it more difficult for the police to carry out their duties.” As the Alberta Court of Appeal said in *R. v. Gunn, supra*, at para. 18:

There is not, and likely cannot be, a precise legal definition of “obstructs” as the word is used in s. 129(a). That reality is both a strength and a weakness of the section. Furthermore, any interpretation of “obstructs” must respect the fact that there is in this country, a right to question a police officer. The cases demonstrate that courts have had difficulties measuring the interaction between individuals and peace officers and drawing the line between innocent and culpable conduct.

[19] The second issue deals with *mens rea*. The *Criminal Code* does not criminalize innocent acts regardless of their consequences. A person who takes a photograph of a police officer in the execution of that officer’s duty with no intent but to capture the moment electronically is not culpable. This is true even if the taking of the photograph in some way makes it more difficult for the officer to carry out his or her duties. On the other hand, a person who intends to obstruct an officer while that officer is carrying out his or her duties is not absolved of culpability because the person is also taking photographs.

[20] The leading case in Alberta on obstruction of a peace officer is that of *R. v. Gunn, supra*. *Gunn* involved a lawyer who instructed his client to leave a courthouse when he knew that the client was under arrest and in police custody. The lawyer mistakenly thought that the warrant and arrest were illegal.

[21] In *Gunn*, the Court of Appeal concluded that obstruction of a peace officer was a general intent offence and that “*mens rea* is present when an accused knows what he or she is doing, intends to do it and is a free agent.” There is no need for an “ulterior motive or purpose” as is required in a specific intent offence. As stated in *R. v. Yussuf, supra*, the distinction between specific and general intent offences is useful when classifying offences for which intoxication can be a defence. It is not useful for the offence of obstructing a peace officer, where an innocent intentional act may result in obstruction.

[22] In *R. v. Yussuf*, the Court observed that the plain reading of the juxtaposition of the word “wilfully” beside the word “obstruct” is instructive. The wilful obstruction of a police officer requires that the accused intended to make it more difficult for the officer to execute his or her duty. This would include the accused

recklessly acting with the knowledge that his action would likely result in obstruction.

[23] The reasoning of Justice Paciocco in *Yussuf* with respect to the requirement that the accused must intend to make it more difficult for the police to execute their duty is persuasive. In my view, it expands, rather than contradicts, the Court's test in *Gunn*. In summary, *Yussuf* sets out the following elements as being required in order to prove obstruction of a peace officer in the execution of his duty:

Element 1 - There must be peace officer who is in the execution of a lawful duty as a peace officer;

Element 2 - The accused person must know or be wilfully blind to the fact that this person is a peace officer and must know or be wilfully blind to the act the officer is executing;

Element 3 - The alleged obstructive conduct must be an intentional act by the accused person, or an intentional omission by the accused person constituting a failure by the accused to comply with a legal duty;

Element 4 - That act or omission must make it more difficult for a peace officer to carry out their duties; and

Element 5 - The accused person must intend to make it more difficult for the police to execute their duty.

[24] There is no issue in the case involving Mr. McFadden that he knew that he was dealing with police officers and that he intentionally took the photograph which resulted in his arrest. At issue in this case are the 1st, 4th and 5th elements which will be discussed later.

C. FACTUAL ISSUES

C.1 General Comments

[25] The Court had the benefit of hearing from three of the four police officers who were at the scene of the incident. They are also the three peace officers who are listed on the Information as having been obstructed by Mr. McFadden in the execution of their duty.

[26] Each of the three officers was performing a separate task at the scene. Each would have had observed Mr. McFadden at different times and for different durations. Accordingly, I would expect that their testimony would differ, as it did, on details. For the most part, these differences do not cause me to question the reliability of their observations. For example, the number of people in front of the

Elks Club or who waited for the tow truck are inconsistencies which do not cause me great concern.

[27] What is concerning, however, is a certain willingness on the part of two of the officers to exaggerate to make a point and to evade answering certain questions. Let me explain why these examples of exaggeration and evasion are concerning. This is a case where Mr. McFadden admits that he was in the area of the cargo van and that he was taking photographs. If he was standing back from the cargo van on the sidewalk taking photographs as directed by the police, then he did nothing wrong. If he was standing three feet closer to the van or entering the van, then his actions could very well have obstructed the officers.

[28] To distinguish between these two possible scenarios, the Court requires detailed and specific information. If a witness testifies that Mr. McFadden was not in position A but rather was in position B, which is three feet closer to the van, then the Court needs to have some confidence in that witness's ability to make that observation. The Court's confidence is diminished if a witness exaggerates or evades.

[29] For example, Cst. Watson initially stated that Mr. McFadden was obstructing him from searching the vehicle because he "had to continually stop doing [his] job to address him." When he was challenged on this, he said, "multiple times". When he was asked for further clarification, Cst. Watson said that there were two times when he had to stop.

A. He was obstructing me searching the vehicle because I had to continually stop doing my job to address him being in the middle of the street, to address him yelling and screaming.

Q. Sorry. He was obstructing you – I missed . . .

A. From doing my job. I had to stop searching – to stop looking for the registration and insurance papers multiple times to address his behaviour.

Q. Multiple times. I'm not --- how many when you say "multiple times," –

A. Twice.

Q. - - how many times is that?

A. Two times.

[30] Cst. Sales was evasive, if not obstinate, in answering a specific question:

Q. You didn't have a search warrant to do that?

A. I searched incidental to arresting him as it was around his neck.

Q. You didn't have a search warrant to do that?

A. I searched incidental to his arrest as it was around his neck.

Q. Constable Sales, did you have a search warrant or not?

A. I searched it incidental to his arrest.

Q. Yeah, okay. Are you not able to answer the question as to whether or not you had a search warrant?

A. No, I did not have a search warrant.

[31] Further, Cst. Sales stated that there were two individuals in the vicinity of the van who he thought could be friends of Mr. McFadden. With Mr. McFadden yelling so angrily, Cst. Sales felt that he "couldn't put [his] back to these individuals." Yet, the series of photographs taken by Mr. McFadden, for the most part, show the officers, including Cst. Sales, facing the van with their backs to the sidewalk. When confronted with these photographs, Cst. Sales qualified his answer to say that he would not have put his back to these individuals if his fellow officers were not there.

[32] It is unfortunate when the Court observes these traits in professional witnesses when they are testifying with respect to matters that are not central to the case. It means that when these same witnesses are testifying with respect to matters which are important to decide the outcome of the case, the Court must treat their testimony with caution.

C.2 State of Intoxication

[33] The three police officers who testified were all of the opinion that Mr. McFadden was "intoxicated" during his interaction with them. Cst. Watson said that Mr. McFadden slurred his speech and had the smell of liquor on his breath. There were no obvious coordination problems and Mr. McFadden was moving with purpose. Cst. Watson had grounds to suspect that Mr. McFadden had alcohol in his body such that if he were in a traffic stop situation, Cst. Watson felt he would have had grounds to administer an Approved Screening Device demand.

[34] Cst. Hipolito, who testified that he had eight years dealing with drunks, said that Mr. McFadden had been drinking a lot. He was slurring his speech, stumbling across the road, and walking in a concentrated manner. Cst. Hipolito, if he was in a traffic stop situation, would have arrested Mr. McFadden for impaired driving. In other words, Cst. Hipolito felt that he had reasonable grounds to believe that Mr. McFadden's ability to drive was impaired by alcohol.

[35] Cst. Sales said that Mr. McFadden was not slurring his speech and had no problem walking. Mr. McFadden's eyes were glossy and bloodshot. Cst. Sales could smell the odour of liquor on his breath. Mr. McFadden took a defensive stance while in police cells.

[36] Sarah Heaton recalls Mr. McFadden having a pint of beer and a Caesar at the Black Knight Pub. She may have ordered a third round. Ms. Heaton has seen Mr. McFadden intoxicated before. It is her opinion that on the night of July 4, 2015, he was sober. She did not recognize any signs of intoxication on him.

[37] Mr. McFadden testified that he did not consume alcohol before going to supper at Sarah Heaton's house. He does not recall whether he had wine with dinner but knows he did not bring beer with him. He had one pint of Kokanee beer and a Caesar at the Black Knight. A third round was ordered including a beer for Mr. McFadden. He does not know if he touched the second beer. When Mr. McFadden interacted with the RCMP, he was not feeling the effects of the beer or the Caesar or the combination of the two.

[38] The level of Mr. McFadden's intoxication is important for a number of reasons. First, it affects the Court's assessment of the reliability of his testimony. If he was intoxicated to the extent observed by Cst. Hipolito, for example, his ability to accurately recollect where he was standing when he was taking a photograph would be suspect. Second, Mr. McFadden's judgment would be affected if he were intoxicated.

[39] I am aware that the Court must treat with some caution, the testimony of alcohol consumption of someone who has spent three hours in the bar. In the absence of receipts or bar tabs showing what has been ordered, patrons often lose track of what has been ordered. In this case, however, Mr. McFadden and Ms. Heaton are specific in their testimony. Although Ms. Heaton is a close friend of Mr. McFadden, I have no reason to believe that she was not telling the truth as best as she could remember it.

[40] The three officers were inconsistent in their observations. For example, Cst. Watson and Cst. Hipolito said Mr. McFadden was slurring his words, whereas Cst. Sales said he was not. Cst. Sales and Cst. Watson said that Mr. McFadden had no problem with coordination; whereas Cst. Hipolito said he was stumbling across the road. I accept the testimony of Mr. McFadden and Ms. Heaton that the accused had consumed a pint of beer, a Caesar and possibly part of another beer over the three hours that they were at the pub. I accept that he had the smell of liquor on his breath as indicated by all three officers. I do not accept that he was slurring his speech or that he was stumbling when walking.

C.3 Yelling and Swearing

[41] Mr. McFadden said that he was not yelling and swearing at the police officers. He admits to having raised his voice and having muttered under his breath, “I’m going to get my fucking camera.” after Cst. Hipolito told him, “What the fuck do you want? You shouldn’t be here. Get the fuck out of here.” Mr. McFadden testified that he does not use profanity in a face to face situation with police officers.

[42] Each of Cst. Sales and Cst. Watson testified that Mr. McFadden was yelling and swearing. Cst. Hipolito said that Mr. McFadden was yelling but does not recall him swearing.

[43] When Mr. McFadden testified in Court, his voice was harsh and clear. It is easy to see that if he raised his voice, it would come across as being aggressive. I accept that Mr. McFadden was asserting his right to be at the scene and to take photos. I also find that his voice was raised. I would not be surprised to find that he swore, but nothing turns on this. I am satisfied that Mr. McFadden was interacting with the police using a raised voice; however, I do not accept that he was “intoxicated” and “yelling and swearing” at the police.

C.4 Police Instructions

[44] Mr. McFadden testified when he first encountered Cst. Hipolito at the back of the van, Cst. Hipolito said, “What the fuck do you want? You shouldn’t be here. Get the fuck out of here.” When he got back to the van with his camera, he recalled Cpl. Pokiak saying, “You can’t take photographs of us, that’s obstruction.” Mr. McFadden told Cpl. Pokiak and another officer that he had the right to stand on the public sidewalk and take photographs. The other officer, who was either Cst. Sales or Cst. Watson said, “You can take photographs, but don’t get in our way.”

[45] When Mr. McFadden was taking photos of the back of the van, Cst. Watson told him that he must return to the sidewalk. As a result of his discussions with police officers, Mr. McFadden felt that he was allowed to take photographs of their investigation or search.

[46] Cst. Watson testified that when he first saw Mr. McFadden on the sidewalk, he said to him, “Absolutely, you can take all the photos you want. Just please don’t interfere with our investigation.” Later on, when Mr. McFadden was taking photos from the road, Cst. Watson told him that he could take photographs but that he could not stand in the road.

[47] Cst. Hipolito testified that at the back of the van, he told Mr. McFadden to stay clear of the area and to walk around them and the police vehicles. In particular, he said “Can you move to the side, sir?” When Mr. McFadden started yelling and telling Cst. Hipolito that he could walk where he wanted to, Cst. Hipolito raised his voice and said that if Mr. McFadden did not stop yelling and comply, he would arrest him for disturbing the peace. When Mr. McFadden was on the sidewalk and yelling that he could be there, Cst. Hipolito said, “Okay, but please stay back” and “Stop yelling. Stay away from the vehicle.”

[48] Cst. Hipolito heard Cpl. Pokiak tell Mr. McFadden that he could take photos on the sidewalk but to stay back from the members.

[49] Cst. Sales did not testify that he gave instructions directly to Mr. McFadden. He heard Cst. Hipolito tell Mr. McFadden to get off the road. He heard Cst. Watson tell Mr. McFadden that he could take photos but he had to get off the road and that he could take photographs from the sidewalk.

[50] I am satisfied that Mr. McFadden was instructed by the RCMP that he could take photographs of the van and the investigation from the sidewalk. I am also satisfied that Mr. McFadden was aware that the vehicle was the focus of the investigation; that he was not to get in the officers’ way and that he was to stay away from the van.

C.5 How close to the van?

[51] Mr. McFadden said that when he was on the sidewalk, he never got closer than 3 to 3 ½ feet from the van.

[52] Cst. Watson was inside the van at the driver’s door when Mr. McFadden took the last photograph and was arrested. Cst. Watson spoke of the “plane” that was created by the door frame on the passenger side. He testified that no part of Mr. McFadden’s body broke that plane and entered the interior of the van. He testified that 2 to 3 inches of the lens of Mr. McFadden’s camera would have broken that plane.

[53] Cst. Hipolito did not observe the action that caused Mr. McFadden to be arrested. Cst. Sales was at the side of the van by the passenger door. He saw Mr. McFadden lean into the van such that his right shoulder or right arm would have broken the plane. Cst. Sales also remembers Mr. McFadden’s feet being on the road and not on the sidewalk when Cst. Sales arrested him.

[54] Photograph 781 of Exhibit 3 shows the two side doors to the cargo area open at approximately 90° angles to the side of the van. The front passenger door is also

open. According to the Agreed Statement of Facts, photograph 781 was taken at 12:40:33 a.m. which is 8 seconds before photograph 782 was taken. Photograph 782 is the photograph that Mr. McFadden took just before he was arrested. Given these photographs and the testimony of Cst. Sales and Mr. McFadden, the configuration of the doors at the time of the arrest would be the configuration shown in photograph 781.

[55] Cst. Sales described what happened as follows:

- A. When I moved – when I went to move from the front passenger side into the side doors that were open, I saw the man was leaning in with his camera taking a photo and heard a click. At that point, I arrested the man for obstructing a police officer.

[56] Cst. Sales also described seeing the back of Mr. McFadden:

- A. Well, I was -- I was -- I had left the front passenger door and I don't know how wide the doors were, maybe 2 feet -- and I was going around to search because I didn't think anyone was in there at that point, and that's when I saw the back of the man.

[57] Mr. McFadden testified:

- Q. What's the closest you got to the cargo doors – sorry, I want to be clear. I'm talking about the body not the doors, but the body of the van, what's the closest you got to the body?
- A. Three to three and a half feet.
- Q. And in terms of the time at which you took photograph 782, we see that it's 12-40-41, what was going on at the instant that you were taking that photograph?
- A. 782?
- Q. Yes.
- A. The officers had cleared the passenger side of the van. So there are no police officers.

[58] Before making any finding with respect to Mr. McFadden's position in relation to the van, it is necessary to comment on the "re-enactment" that was entered as Exhibit 4. These were a series of photographs submitted by the Defence showing Mr. McFadden taking a photograph through the open side cargo doors of a van similar to the van that was parked on July 5, 2015. The first photograph in Exhibit 4 is a photograph which is supposed to re-create photograph 782 of Exhibit 3.

[59] If I understand correctly what the Defence was trying to do with Exhibit 4, it is as follows. The first photograph in Exhibit 4 is meant to be identical to photograph 782. The cargo van was parked in the same location during the re-

enactment as the cargo van was parked on July 5, 2015. The same camera was used. Therefore, according to the Defence, Mr. McFadden must have been standing in the same position on July 5, 2015 when he took photograph 782 as where he was standing during the re-enactment.

[60] I allowed the Defence to enter Exhibit 4 as a pictorial representation of where Mr. McFadden recalls himself to have been standing on July 5, 2015 when he took photograph 782. I did not allow it as independent proof of where he was standing.

[61] In my view, an expert witness would be required to explain whether the methodology of such a re-enactment would be accurate in determining where Mr. McFadden was standing. Variables such as how the lens was zoomed in or out, the angle of the camera and the position of the van jump to my mind as requiring an explanation. Further, the whole re-enactment starts with an assumption that the first photograph in Exhibit 4 depicts exactly the same scene as photograph 782. This is not apparent to me. There are differences in these two photographs in my view.

[62] Let me make some other comments about the evidence of Mr. McFadden's position at the time of his arrest. Cst. Sales was examined in chief in person on June 22, 2016. He was cross-examined during a video appearance on September 1, 2016. During his cross-examination, he stated that he remembered that Mr. McFadden was standing on the roadway between the van and the sidewalk when Cst. Sales arrested him. This was not something that he had recalled when he testified in June. If I accept this testimony, then Mr. McFadden's feet would have been within inches of the frame of the van.

[63] I do not accept Cst. Sales testimony in this regard. Given my previous comments about his testimony, I felt that Cst. Sales had a tendency to enhance his testimony to make a point. I have already given an example of this. What I accept from Cst. Sales is that he saw the back of John McFadden as he came around the open side doors into the cargo area. Cst. Sales estimated these doors to be about 2 feet wide and therefore extend about 2 feet from the frame of the van. This is consistent with the measurements in the re-enactment photos in Exhibit 4

[64] Although I have expressed my concerns about Cst. Sales enhancing his testimony, I am satisfied that he arrested Mr. McFadden because he believed Mr. McFadden had crossed a boundary around the van. He would not have reacted in this way if Mr. McFadden was standing 3 ½ feet back as depicted in the re-enactment.

[65] In my view, Mr. McFadden was standing within the 2 foot “shadow” of the cargo doors and therefore within 2 feet of the frame of the van. I do not accept that Cst. Sales would have been able to see Mr. McFadden’s back if Mr. McFadden had crossed the threshold with part of his body and the camera and leaned in with his shoulder as Cst. Sales described. In my view, Cst. Watson was in the best location to observe Mr. McFadden’s position with respect to the van. Cst. Watson said that no part of Mr. McFadden’s body entered the van and only a portion of the camera lens entered the interior of the van.

D. LEGAL ISSUES

D.1 Was there an obstruction?

[66] The three officers gave various reasons why they felt Mr. McFadden was obstructing their investigation:

- (a) Mr. McFadden, by yelling and swearing about his right to take photographs and to be there was agitating the crowd of bystanders; the officers were worried about their safety and losing overall control of the scene;
- (b) Mr. McFadden was an angry and upset man with a camera. He was therefore someone about whom the officers had to be worried;
- (c) The officers had to stop their search of the van to deal with Mr. McFadden;
- (d) Cst. Sales was concerned that Mr. McFadden may have contaminated the search scene by putting something or removing something from the van.

[67] As stated in paragraph 50 of *Gunn*, “the purpose of s. 129(a) is to limit the actions of a citizen toward a police officer who is executing his or her duty.” The inquiry as to whether the actions of an accused amount to obstruction, i.e., whether the actions make it more difficult for a peace officer to carry out his or her duties must be made in the context of the circumstances of the duties being carried out. In this situation, there were four police officers at the scene. They were investigating a stolen licence plate on a van. As Cst. Watson said, “it was actually not a lot going on. It was just some guys looking for some papers in a van.” The intoxicated person associated with the van had been arrested and was in the back seat of a police vehicle.

[68] I have already commented on Mr. McFadden's demeanour. He was speaking in a raised voice. He may have very well been seeking support from bystanders; however, I am satisfied from the photographs and the differences in the officers' testimony that there was no "crowd" of chanting onlookers on the sidewalk by the van. Furthermore, given that there were four officers present, there was no danger posed by the two bystanders on the sidewalk or even by a greater number of people at the doors of the Elks Club.

[69] There is no indication in the officers' demeanour as captured in Mr. McFadden's photographs that indicates they are concerned with him as an angry man with a camera (to use Cst. Watson's words) or with any of the bystanders.

[70] The officers were searching a vehicle. It should be apparent to passersby that the interior of the vehicle is off limits to them. A person who entered the vehicle or put his hands in the vehicle would be taking an action that would require the police to stop what they were doing and react.

[71] This was not a situation where Mr. McFadden was given clear boundaries by the police. He was told that he could take photographs from the sidewalk and to stay away from the van. There was no police tape outlining these boundaries. He was not given precise instructions as to what "stay away" meant.

[72] I do not find that he put his hands in the van so there was no danger that he had contaminated the crime scene.

[73] Given my finding of fact as to where Mr. McFadden was positioned when he took photograph 782 and was arrested, I cannot find that he obstructed the police officers.

D.2 Were the police officers in the execution of their duties?

[74] The Defence submits that the search of the cargo van was unlawful and therefore, the police officers were not in the execution of their lawful duties. As I understand the argument, the Defence says that the police officers were relying on the *Motor Vehicles Act*, R.S.N.W.T. 1988, c.M-16, as amended, as authority to search for the registration and insurance documents. The *Motor Vehicles Act* does not authorize the search of a vehicle in such a situation and therefore the search was not authorized by law. The unlawful search would be a breach of the section 8 *Charter* right of Paul Rothwell, the person who was arrested for possessing the stolen licence plate.

[75] The argument raises the interesting question as to whether or not Mr. McFadden can raise the breach of someone else's *Charter* right as a reason for

saying that the police were not in the lawful execution of their duty and therefore, he cannot be found guilty of obstructing them.

[76] The answer to this question can be left to another day. It is not necessary to answer it since I find that the police were in the lawful execution of their duties for the following reasons.

[77] The charge as it appears on the Information refers to the officers being “engaged in the execution of their duty, a criminal investigation.”

[78] Shortly after he entered the white van through the driver’s door, Paul Rothwell was detained by Cst. Watson. Cst. Watson testified that he detained Mr. Rothwell for the purpose of investigating an offence of possession of property obtained by crime. Mr. Rothwell was later arrested by Cst. Hipolito for possession of stolen property. This is an offence under the *Criminal Code*. Cst. Watson testified that with respect to the the detention and the arrest, the officers were trying to locate the vehicle identification number of the van to see if it was stolen since the plate did not match the van. According to Cst. Watson, the vehicle identification number was not on the dash or the door.

[79] The Crown submits that the search of the van for registration or insurance papers that would indicate the vehicle identification number was done incidental to the arrest of Paul Rothwell.

[80] In *R. v. Caslake*, [1998] 1 S.C.R. 51, Chief Justice Lamer stated that search incident to arrest could include the search of a vehicle:

23 As explained above, these limits will be no different for automobiles than for any other place. The right to search a car incident to arrest and the scope of that search will depend on a number of factors, including the basis for the arrest, the location of the motor vehicle in relation to the place of the arrest, and other relevant circumstances.

...

25 In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier*, [1990] 1 S.C.R. 158 (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

[81] The law regarding search incidental to arrest and the searching of vehicles was reviewed in *R. v. Simpson*, [1993] O.J. No. 2845 and summarized at para. 64:

(iii) If a search is justified in the attendant circumstances surrounding the lawful arrest, its justified spatial scope extends to searching the person, clothing and personal effects in possession or reach of the arrested person, as well as his/her relevant, immediate surroundings at the time of arrest (having due regard for the underlying purposes justifying the search), and extends to searching the interior of a motor vehicle in which the arrested person was riding just prior to his/her arrest: *R. v. Brezack*, [1949] O.R. 88; *Langlois and Beddard v. Cloutier*, [1990] 1 S.C.R. 158, and authorities therein considered with approval;

[82] Given that Mr. Rothwell was arrested for possession of a stolen licence plate, it is justifiable to search the van to determine if it was stolen. In my view the search was lawful and the police officers were in the execution of their duty.

D.3 Did Mr. McFadden have the requisite *mens rea*?

[83] John McFadden testified that he saw that there were no police officers at the open side doors to the cargo area and he decided to take a photograph of the interior of the van. This was his decision. He intended to take the photograph. He did so of his own free will.

[84] Did John McFadden intend to make it more difficult for the police to execute their duty? I have found that Mr. McFadden did not obstruct the police officers. Even if I am wrong in that finding, in my view, he did not intend to obstruct the police officers.

[85] Mr. McFadden testified that when he saw the police emergency lights flashing and the lane blocked off, he ran to investigate. It was part of his job to investigate. It was part of his job to take photographs. He felt he had the right to take photographs. When he took photograph 782, he did so when he thought that he would not be interfering with any police officers.

[86] The Crown submits that I should disbelieve Mr. McFadden and infer that he had the intent to obstruct the officers or at least, was willfully blind to the fact that his actions would obstruct the officers. The steps in this inference are as follows:

- (a) Mr. McFadden's relationship with the RCMP was poor. He had been refused entry to a press conference.
- (b) Mr. McFadden was angry at the RCMP as a result of this.
- (c) In the early morning hours of July 5th, he was angry and intoxicated.

- (d) He ran to the location of the police vehicles and van and when he was told to stay back, he became angrier.
- (e) He muttered under his breath, “I’m going to get my fucking camera.” and ran to get his camera.
- (f) He used his camera as a pretext to obstruct the police officers. This is evident by the poor quality of the photographs and their lack of newsworthiness.

[87] Mr. McFadden testified that his relationship with the RCMP had been largely repaired at the time of the incident. He testified that the camera was very new to him and he did not know how to use all of its features, such as, for example, the flash or the ability to review the photographs. Mr. McFadden testified that he was more frustrated than angry with the RCMP.

[88] I have no reason to disbelieve Mr. McFadden on these points. There was no evidence adduced about his relationship with the RCMP, other than what he stated in cross-examination. There was no evidence that contradicted his statement about the camera. I have found that he was not intoxicated as variously described by the police officers. Accordingly, I have reasonable doubt that he intended to obstruct the police officers.

E. CONCLUSION

[89] For the reasons stated, the Crown has not proven, beyond a reasonable doubt, that John McFadden obstructed the police officers in their investigation or that he intended to obstruct the police officers in their investigation.

[90] He is therefore acquitted.

[91] The camera that was entered as an exhibit during the trial will be returned to Mr. McFadden after the expiry of the appropriate appeal period provided that no appeal is filed.

“Garth Malakoe”

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 21st day of
October, 2016.

**Corrigendum of the Reasons for Decision
of
The Honourable Judge Garth Malakoe**

1. An error occurred in Paragraph 41. The wording of the sentence contains an error. Paragraph 41 reads:

[41] Mr. McFadden said that he was not yelling and swearing at the police officers. He admits to having raised his voice and having muttered under his breath, “I’m going to get my fucking camera.” after Cst. Hipolito told him, “What the fuck **to** you want? You shouldn’t be here. Get the fuck out of here.” Mr. McFadden testified that he does not use profanity in a face to face situation with police officers.

Paragraph 41 has been corrected to read:

[41] Mr. McFadden said that he was not yelling and swearing at the police officers. He admits to having raised his voice and having muttered under his breath, “I’m going to get my fucking camera.” after Cst. Hipolito told him, “What the fuck **do** you want? You shouldn’t be here. Get the fuck out of here.” Mr. McFadden testified that he does not use profanity in a face to face situation with police officers.

2. The citation has been amended to read:

Citation: *R. v. Robert John McFadden*, 2016 NWTTC 15.cor 1

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROBERT JOHN McFADDEN

<p>Corrected judgment: A corrigendum was issued on November 9, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.</p>
--

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

[Section 129(a) of the *Criminal Code*]