Date: 2021 05 28
File: T-1-CR-2020-000509

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ADRIAN BERGERON

REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE DONOVAN MOLLOY

Heard at:	Yellowknife, Northwest Territories
Date of Decision:	May 28, 2021
Counsel for the Crown:	Travis Weagant
Counsel for the Accused:	Jessi Casebeer

[Sections 320.14 & 320.15 of the *Criminal Code*]

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A. INTRODUCTION

[1] During the early morning hours of February 5, 2020, Adrian Bergeron, after consuming an unknown quantity of alcohol, marooned his vehicle in an ill-considered attempt to drive his Ford Escort through a bank of snow on Yellowknife's main street (Franklin Avenue). As an RCMP patrol vehicle came upon the scene, Mr. Bergeron exited the driver's side of the then immobile vehicle. A few minutes later, as a result of being arrested for impaired driving, Mr. Bergeron was taken to the RCMP detachment, where he would remain until 11:54am. This was long past the point at which he would have achieved sobriety, even if Mr. Bergeron had been impaired to the degree described by the arresting officer.

[2] Much of Mr. Bergeron's initial time at the Detachment was recorded via audio and/or video recordings. From these recordings the Court was able to make extensive observations of some of the alleged indicia of impairment and some very unpleasant verbal and physical exchanges between Mr. Bergeron and the two RCMP officers that testified at Mr. Bergeron's trial. The unpleasant verbal exchanges were aggravated by one of the officer's intentionally leading Mr. Bergeron to inject homophobic comments into the already crass verbal exchange. This is a tactic that the officers view as an appropriate means to defuse such situations.

[3] While Mr. Bergeron's comments to the officers regarding their spouses were deplorable and reprehensible, they did not give the officers carte blanche to ignore his right not to be arbitrarily detained or imprisoned. Mr. Bergeron's conduct also did not justify what I find to be excessive force used by the two officers to lodge him in a 'drunk tank', where he was intentionally overheld as further retaliation for his nasty and morally unacceptable comments to the officers.

[4] While the officers were quite candid in acknowledging their failure to check on their equipment, their lack of knowledge regarding RCMP policies and their lack of adherence to professional expectations, they do not appear to appreciate the impact of such disregard on any assessment of their credibility. The qualifications and excuses, suggesting that there is less attention to equipment and policy in the north, did nothing to enhance any assessment of their credibility.

[5] What follows are my reasons for finding Mr. Bergeron not guilty of the offences of impaired driving and refusal of a breath demand. I also find that Mr. Bergeron's rights pursuant to section 8 and 9 of the Charter were violated. I dismiss Mr. Bergeron's application alleging a breach of his section 10(b) rights as he did not meet the onus of proof applicable to that determination.

[6] As there was virtually no reliable evidence upon which I could conclude that the Crown had proven the offence of impaired driving[1] and insufficient evidence to prove objective grounds for the breath demand, I do not intend to address any Charter remedies in this decision.

B. EVIDENCE

[7] The matter, at the instance of the parties, proceeded as a blended *voir dire*/trial. It commenced with the introduction of an Agreed Statement of Facts tendered pursuant to section 655. The facts as set out in it are:

i. The accused, Adrian Bergeron, was lodged in cell MT2 at the Yellowknife RCMP detachment at 3:34AM on February 5, 2020.

ii. When placed in cell MT2, Mr. Bergeron was in an agitated state and remained agitated until 5:15AM.

iii. Cst. Lawrence of the Yellowknife RCMP spoke with Mr. Bergeron in cell MT2 at 10:08AM.

iv. Cst. Lawrence removed Mr. Bergeron from cell MT2 at 11:29AM.

[1] I refer of course to evidence, proving beyond a reasonable doubt, of any degree of impairment of Mr. Bergeron's ability to operate a motor vehicle within the meaning of *R. v. Stellato*, 1994 CanLII 94 (SCC).

v. Cst. Lawerence began reviewing Mr. Bergeron's release conditions with him at 11:41AM.

vi. Mr. Bergeron was released from RCMP custody at 11:51AM.

vii. Between 3:34AM and 10:08AM, Mr. Bergeron did not interact with any member of the RCMP. During this period a civilian cell guard conducted routine welfare checks.

[8] No evidence was tendered or incorporated as part of the Agreed Statement of Facts, in terms of the breath technician's opinion as to whether Mr. Bergeron's two attempts at providing a sample were feigned or genuine. The technician was not called even though permission was granted for him to testify virtually from another jurisdiction. The Defence conceded that if the Crown had proven the lawfulness of the breath demand, Mr. Bergeron intentionally refused to provide a breath sample without any reasonable excuse.

[9] On February 5th, 2020 Cst. Gordon Raeside was patrolling downtown Yellowknife, in a marked vehicle, accompanied by his immediate supervisor and watch commander, Cpl. Jason Archer. While conducting a vehicle stop of a truck in the downtown area, Cst. Raeside noted an older model green station wagon drive by, being driven by what he believed was a male person. The vehicle appeared to have come from the area where the Kilt & Castle Pub is situated. Cst. Raeside perceived the vehicle as being driven aggressively as it fishtailed at a corner. Cst. Raeside candidly acknowledged however that the road conditions consisted of *snow and ice on the roads with large ruts*.

[10] About five minutes after concluding their traffic stop of the truck, Cst. Raeside and Cpl. Archer recommenced their patrol of the downtown area. At that time the officers were advised, via dispatch, that a report had just been received about a possible impaired driver with a male passenger having recently departed from the Kilt & Castle. The vehicle in question was described as a green Ford Escort.

[11] Approximately five minutes after receiving that dispatch, the officers encountered Mr. Bergeron's vehicle, a green Ford Escort, perched atop a snow bank of approximately 12 inches in height. As Mr. Bergeron stepped out of the driver's side the officers noticed that a female person also exited the vehicle from its passenger side. The snow bank was in the middle of the two lanes travelling towards the other side of Yellowknife. Graders associated with the City of Yellowknife had just started pushing snow towards the center of the lane.[2] This is a normal experience

[2] Anyone driving by later that evening would encounter a snow bank of such width and depth that attempting to drive through it would represent sheer folly.

in Yellowknife as City employees endeavour to maintain safe road conditions in an arctic environment.

[12] While Cst. Raeside dealt with Mr. Bergeron, Cpl. Archer spoke with the female passenger, took three digital photographs[3] and made other observations. Unfortunately he had a poor recollection and only scant notes from which he was unable to refresh his memory on many important points.

[13] According to Cst. Raeside, as Mr. Bergeron navigated his way down from the snowbank onto the even and uncluttered portion of the road surface, Cst. Raeside observed Mr. Bergeron to have droopy and tired eyes, and noticed an odor of *beverage alcohol* on Mr. Bergeron's breath. Once on the even surface, Cst. Raeside testified that Mr. Bergeron was noticeably swaying as he walked on the even road surface. Cst. Raeside stated that after advising Mr. Bergeron that they had received a report of his car being operated by a drunk driver, he asked Mr. Bergeron if he had been drinking. Mr. Bergeron gave inconsistent answers according to Cst. Raeside.

[14] On the basis of all of the above, Cst. Raeside testified that:

> *Believing that he was <u>drunk</u> and that he had been the driver of the vehicle, I arrested him for impaired operation of a vehicle, motor vehicle, and I placed him in the back of my PC.* [emphasis added].

[15] I emphasize the word drunk because much time was spent in attempting to elucidate what drunk and impaired meant to Cst. Raeside. It is very common, when asking any witness for an opinion about a person's level of impairment by alcohol, to ask for a rating on a scale of 1-10 (10 being the highest level of impairment). Those answers are usually then fleshed out by asking the witness to offer their specific observations of signs of impairment that led them to rate it at whatever level they specify. This is an acceptable manner in which to approach the question, particularly in light of the guidance offered in *Gratt v. The Queen*, [1982] 2 S.C.R. 819:

> *Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability*

[3] The photographs were of the Ford Escort, taken from a close perspective that offered little assistance to the Court. Cpl. Archer, on being asked why he took so few digital photos, offered the following, *I didn't take a picture of the snowbank, but in retrospect I should have because it was fairly obvious you couldn't get over it*.

are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

[16] Cst. Raeside rated Mr. Bergeron's level of impairment at 7-8 on the 10 point scale. Cst. Raeside confirmed that he understood that to mean less drunk than passing out and being totally unable to fend for oneself, but much closer to that level of impairment than being moderately impaired. His exact evidence on that point was:

THE COURT: *So to be a 10, what does -- what physical symptoms does somebody have to display?*

A *Oh, I guess if you're a 10, then, like, you're probably -- you're so drunk that you can't care for yourself whatsoever, you're unconscious.*

THE COURT: *Okay. So he was not, and we can see ourselves, he obviously was not --*

A *He wasn't -- he wasn't unconscious, passed out.*

THE COURT: *But seven or eight is pretty drunk.*

A *He was pretty drunk; I agree.*

THE COURT: *So separate and apart from the gentleman, sort of, if I were to ask you to describe for me the presentation, symptomology, of a person who in your opinion is at a level of seven or eight, what would you expect to -- what would be the symptoms that you would regard somebody displaying at that level of impairment?*

A *Poor decision-making, like, poor balance, poor ability to care for themselves, but --*

THE COURT: *Okay.*

A *-- not passed out, drooling.*

THE COURT: *But pretty drunk.*

A They're very drunk, yes.

[17] This turned out be a significant issue to the Court, as Cst. Raeside testified that the detachment was less than 500 meters away from where Mr. Bergeron stranded the Ford Escort. Literally, within 5-10 minutes of Cst. Raeside making his initial observations, they all entered the detachment through one of its garage bays. Fortunately for Mr. Bergeron, an RCMP video recording commenced at this moment, showing Mr. Bergeron exit from the marked police vehicle, walking unassisted ahead of the officers, through the garage bay and into the holding cell area. It is fortunate for Mr. Bergeron that the recording started at that point because even though it was mere minutes after he had supposedly been observed by Cst. Raeside to be drunk and noticeably swaying, Mr. Bergeron was observed to walk without any difficulty and obviously without any swaying at all.

[18] Prior to being asked by the Court[4] about this blatantly obvious discrepancy, Cst. Raeside advised, that at that point, *he (Mr. Bergeron) would still have been very drunk, yes*. On Cst. Raeside being given what at that point would have been at a minimum his second or third opportunity to view that video during the trial, and being asked about what appeared to be a discrepancy, Cst. Raeside offered variously that:

> *He was walking fairly straight there. It wasn't like he was falling over on the -- the roadside, but when he did speak, he did sway slightly. And at the –;*
>
> *I said he walked <u>very</u> straight, Your Honour;* [emphasis added]
>
> *Then I guess my assessment now, a year later, on what his impairment was for a number is -- is off, but, at that time, I did believe him to be very drunk.;*
>
> *I mean, I'm looking back at it now a year later. On scene, I believed him to be very drunk. Now, that I have -- I mean, I guess I gave an inappropriate number. I still believed him to be -- to be drunk. I mean, I guess, my -- my drunken scale -- .*

[19] While the personal observations of counsel are irrelevant, I note that in closing submissions, after closely reviewing the extensive video recording, Crown counsel could only suggest one limited observation from the lengthy video that might be consistent with Mr. Bergeron being drunk.

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[4] While I appreciate that judges should generally be reluctant to extensively examine witnesses, I was compelled to do so here as neither counsel asked Cst. Raeside about the blatantly obvious discrepancies between his description of Mr. Bergeron's level of impairment and the objective evidence from the video recording.

[20] Cpl. Archer, after confirming that he also observed Mr. Bergeron to be drunk and swaying at the detachment, was asked by Defence counsel to re-watch key portions of the video. On this point, Cpl. Archer offered variously that:

> *Q* *And did you notice any swaying there?*
>
> *A* *Nothing noticeably on video, no.*
>
> - -
>
> *Q* *J. CASEBEER: So at this point, you're standing there. Would you agree that it appears that Mr. Bergeron is being cooperative at this point?*
>
> *A* *Yes.*
>
> *Q* *Okay.*
>
> *THE COURT: So where is the noticeable swaying that you recall him having displayed while walking in from the -- through the bay into the cellblock?*
>
> *A* *Well, it's not on video, Your Honour. I may have seen it outside, but I don't remember off the top of my head, and I wrote in my notes that I saw a wobbly balance, but I didn't write where I seen him wobble.*
>
> *THE COURT: Again, not very helpful.*
>
> *A* *Sorry?*
>
> *THE COURT: Again, not very helpful. So you do not -- you admit now there was no swaying in the -- in that excerpt we just saw?*
>
> *A* *In that video, there was no swaying.*
>
> *THE COURT: Okay.*

[21] The Court's reference to Cpl. Archer's failure to take notes as being unhelpful is a direct result of his evidence, and the numerous instances where he said he could not recall answers (especially on cross-examination) and he had very little by way

of notes that might assist him in recollecting what he in fact observed on the date in question. Cpl. Archer agreed that detailed notes are very important and that as a supervisor it is also very important for him to mentor less experienced officers on good note taking. Cpl. Archer noted that despite 12 prior years of service as an RCMP officer, he is still working on taking adequate notes:

> *THE COURT:* *Yes, all well and good, but you are supposed to do the other things too, are you not, make notes?*
>
> *A* *No, yes, I am. And like I said, I'm -- I'm working on getting my notetaking ability back up.*
>
> *THE COURT:* *How many years have you been in now?*
>
> *A* *Twelve years.*
>
> *THE COURT:* *It is a lot of time to master taking notes, is it not?*
>
> *A* *No, I completely agree.*

[22] It equally failed to inspire confidence in their credibility that both Cst. Raeside and Cpl. Archer appeared unaware as to specifics of their equipment and organization, including:

- Whether there was an approved screening device in their patrol vehicle during the patrol in question;
- What the policy was, if any, on carrying an approved screening device in a patrol vehicle while conducting general patrols of the community;
- Whether anyone had actioned the necessary repairs to the patrol vehicle's dashboard camera (despite it apparently being known to be inoperable for an extended period of time); and,
- The details of policies and procedures regarding the release of prisoners allegedly detained for their own protection due to severe alcohol impairment.

[23] Sadly, Cpl. Archer also offered in his evidence that despite having been posted to the Northwest Territories for 2 years, he has yet to complete his inquiries as to whether he is even legally permitted to operate an approved screening device in this jurisdiction.

[24] Perhaps what is most unfortunate about the officers' testimony were the suggestions that standards and expectations of policing are somehow different and not as rigorous as they are in the south.

[25] The people of the north deserve the best that policing agencies have to offer, not the minimum any such agencies feel they can get by with in discharging their enforcement duties and obligations in Canada's north. The degree to which Indigenous persons are often the victims of violent and traumatic criminal offences demand they receive the best policing reasonably possible. Policing involves far more than enforcement activity, including effective community policing and other initiatives that promote reconciliation.

C. ANALYSIS

[26] I do not intend to further address the Crown's failure to prove, on the beyond a reasonable doubt standard, that Mr. Bergeron is guilty of the offence of impaired driving. As stated in the Introduction to this decision, there was virtually no reliable evidence upon which I could conclude that the Crown proved that the offence of impaired driving was committed by Mr. Bergeron.

[27] In dismissing the impaired driving charge I am not saying that Mr. Bergeron was not impaired to any degree, but simply that the evidence tendered did not prove that his ability to operate a motor vehicle was impaired to any degree.

[28] The elements that the Crown must prove to establish guilt on a refusal charge are:

> *Section 320.15 requires the crown to prove three elements beyond a reasonable doubt, namely (a) that the police made a lawful demand, (b) that the Defendant knew that a lawful demand had been made, and (c) that the Defendant did not comply with that lawful demand. If the prosecution proves these elements, the Defendant can avoid a finding of guilt by showing on a balance of probabilities that he had a reasonable excuse for non-compliance.*[5]

[29] I will simply focus on proof the lawfulness of the demand made by Cst. Raeside. To be a lawful demand, the Crown must prove, beyond a reasonable doubt, that Cst. Raeside subjectively had reasonable grounds to believe, at the time he made the demand, that Mr. Bergeron's ability to operate a conveyance was impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug. Given the issues with his evidence, if I were required to decide the point, I would be hard pressed to accept that the Crown has proven that Cst. Raeside had the required

[5] *R. v. Cummins*, 2021 ONCJ 291.

subjective belief. The Crown, in its submissions, did not disagree with the characterization that Cst. Raeside would not have admitted there was no swaying at the detachment if it had not been captured on the RCMP video.

[30] It is unnecessary to decide that point however as any belief that may have been held by Cst. Raeside must also be objectively reasonable. In terms of the totality of the evidence, including the inconsistencies between the officers' evidence and the reality of the video, the officers' lack of professionalism, an appalling lack of basic notes and a deficient investigation, it is impossible to conclude here that the Crown has proven beyond a reasonable doubt that any belief held by Cst. Raeside was objectively reasonable.

D. DECISION

[31] I accept that there was an odor of alcohol emanating from Mr. Bergeron and that Mr. Bergeron's car was in the same vicinity and matched the vehicle description provided in the dispatch. I note however that the dispatch indicated that the suspect vehicle had a male passenger.

[32] Other than those things however, I find that Cst. Raeside had no other indicia of impairment to rely upon. While those observations could likely have constituted objectively reasonable grounds to demand that Mr. Bergeron provide a breath sample into an approved screening device, they did not constitute objectively reasonable grounds for either Mr. Bergeron's arrest or Cst. Raeside's breath demand.

[33] Generally, in terms of the marooning of the vehicle, Cpl. Archer conceded that a driver, and in particular a SUV driver, could have thought they could drive through the then small snow bank present at the beginning of the snow clearing efforts. In the absence of other evidence, including pictures that would have depicted Mr. Bergeron's view as he drove towards an unanticipated snow bank in the middle of Franklin Avenue, the Crown is asking the Court the make inferences that in my view constitute speculation and conjecture in terms of whether Mr. Bergeron's ability to drive was impaired to any degree.

[34] For all of the above reasons, I find that Mr. Bergeron is not guilty of either offence.

[35] In terms of the overholding and the breach of Mr. Bergeron's right not to be arbitrarily detained, the Crown commendably conceded that at least the latter portion of his detention constituted a breach pursuant to section 9 of the Charter. I find though that the section 9 breach was a far more serious breach of that right than was conceded.

[36] In terms of a characterization of the section 9 breach and what I view as excessive force in lodging him into a police cell, I agree with one of the most salient points made in the Defence's submissions. As the interaction at the detachment dragged on and as Mr. Bergeron continued to provoke the officers with his abusive language and insults to the officers' wives, the officers' behaviour and attitude towards Mr. Bergeron took on an increasingly punitive and retaliatory approach. The officers' confusing explanations for handcuffing him and then later taking the handcuffs off before the physical confrontation are just one factor that contribute to that characterization.

[37] I cannot convict Mr. Bergeron based on his morally offensive and abhorrent comments.[6] I have no doubt that the prolonged verbal abuse that Mr. Bergeron engaged in would test the patience of Job. That however does not excuse the officers intentionally ignoring the rights and freedoms guaranteed to Mr. Bergeron (and all citizens) by our Canadian Charter of Rights and Freedoms.

Donovan Molloy
T.C.J.

Dated at Yellowknife, Northwest Territories, this 28th day of May, 2021.

[6] In fact, accepting that Mr. Bergeron's rudeness was influenced by any alcohol consumption requires speculation in this case. While he did not testify, one of the RCMP audio recordings captured the breath technician telling the other two officers that he (the technician) had previously encountered Mr. Bergeron at a restaurant where Mr. Bergeron worked. The technician, in Mr. Bergeron's presence, said that Mr. Bergeron was a real jerk.

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