

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

**BETWEEN:**

**HIS MAJESTY THE KING**

**- and -**

**RICHARD STANLEY ROBERTS**

---

**REASONS FOR DECISION**  
**of the**  
**HONOURABLE DEPUTY JUDGE B.E. SCHMALTZ**

---

Heard at: Yellowknife, Northwest Territories  
Date of Decision: March 28, 2023  
Date of Hearing: February 27, 2023  
Counsel for the Accused: Lyndon Stanzell  
Counsel for the Crown: Sofia Panaccio

[Sections 8 and 10(b) of the *Charter* Application]

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

**BETWEEN:**

**HIS MAJESTY THE KING**

**- and -**

**RICHARD STANLEY ROBERTS**

---

**A. INTRODUCTION**

[1] Richard Roberts was charged with driving a motor vehicle (conveyance) while his ability was impaired by alcohol (s. 320.14(1)(a) of the *Criminal Code*), and with refusing, without lawful excuse, to provide samples of his breath (s. 320.15(1) of the *Criminal Code*). Both charges arose in Yellowknife on September 23, 2021.

[2] Mr. Roberts brought a *Charter* Application alleging breach of his ss. 8 and 10(b) rights. The matter proceeded by way of a blended *voir dire* and trial on February 3, 2023. By agreement, the evidence called would be applied to both the *voir dire* and the trial. The Crown called two witnesses, Cst. Grimshaw and Cpl. Gavel. Defence did not call any evidence. After the evidence was called, the matter was adjourned to February 27, 2023, for submissions. On February 27, after hearing submissions, I dismissed both charges giving very brief reasons, advising that I would file written reasons for my decision at a later date. Below are the written reasons for my decision.

**B. FACTS**

[3] On September 23, 2021, shortly after midnight, Cst. Grimshaw saw a 2009 Ford Mustang driving on Franklin Avenue. Cst. Grimshaw recognized the vehicle from dealings he had with the driver of that vehicle the night before. Cst.

Grimshaw followed the vehicle, recognized Mr. Roberts as the driver, activated his emergency lights and the vehicle pulled over.

[4] As Cst. Grimshaw walked over to the driver's window he noted Mr. Roberts was attempting to light a cigarette. While speaking to Mr. Roberts, Cst. Grimshaw noted the odour of liquor coming from the vehicle, and that Mr. Roberts was slightly slurring his S's. Cst. Grimshaw made an Approved Screening Device demand which Mr. Roberts complied with; at 12:18 am Mr. Roberts registered a fail on the ASD. Cst. Grimshaw formed the opinion that Mr. Roberts' ability to operate a motor vehicle was impaired by alcohol, and arrested Mr. Roberts for impaired driving. Mr. Roberts got out of his vehicle, Cst. Grimshaw handcuffed Mr. Roberts and took him to Cst. Grimshaw's police vehicle, placing him in the back seat. There was also a passenger in the vehicle who Cst. Grimshaw believed was intoxicated.

[5] At some point, shortly after Cst. Grimshaw arrested Mr. Roberts, Cst. Ellis arrived at the scene. Once Cst. Grimshaw placed Mr. Roberts in his vehicle, Cst. Grimshaw returned to Mr. Roberts' vehicle to deal with the passenger in the vehicle. Cst. Ellis was also present. The passenger was arrested as Cst. Grimshaw had been told that the passenger had 34 outstanding warrants. Cst. Ellis took the passenger to Cst. Ellis' vehicle, and Cst. Ellis then returned to Mr. Roberts' vehicle. At this point Mr. Roberts had been secured in Cst. Grimshaw's vehicle, and the passenger had been secured in Cst. Ellis' vehicle.

[6] Cst. Grimshaw did not immediately return to deal with Mr. Roberts, to advise him of the reason for his arrest, or his right to counsel, or to read him the formal breath demand. Instead, Cst. Grimshaw said to Cst. Ellis "I got a feeling we're going to find something." The two officers then proceeded to completely and thoroughly search Mr. Roberts' vehicle, including under the seats, under the hood, and in the trunk.

[7] Cst. Grimshaw conceded that it was not necessary to search Mr. Roberts' vehicle immediately; the search of the vehicle could have waited until after he had told Mr. Roberts of his right to counsel. Cst. Grimshaw further conceded that he had not made the breath demand to Mr. Roberts as soon as practicable.

[8] Cst. Grimshaw further conceded that he did not think he should have searched under the hood of the vehicle, and testified "so I apologize for that." When Cst. Grimshaw was asked what he expected to find under the hood of the vehicle he testified "...other contraband or stolen property or drugs or weapons or something like that...".

[9] Cst. Grimshaw also searched the trunk of Mr. Roberts' vehicle, even though it was not possible to access the trunk of the vehicle from the inside of the car, i.e. the trunk was "walled off from the cab of the vehicle". Cst. Grimshaw accepted that it would not be possible for Mr. Roberts to access the trunk of his vehicle while he was driving.

[10] Cst. Grimshaw made no note of the search of Mr. Roberts' vehicle in his General Report.

[11] At 12:36 am Cst. Grimshaw told Mr. Roberts why he was arrested; at 12:37 am Cst. Grimshaw read Mr. Roberts his right to counsel; at 12:39 am Cst. Grimshaw read Mr. Roberts the police caution, also known as the right to silence; and at 12:40 am Cst. Grimshaw read Mr. Roberts the formal breath demand.

[12] Cst. Grimshaw then made arrangements for Mr. Roberts' vehicle to be towed and for a Qualified Breath Technician to attend the Detachment to take breath samples from Mr. Roberts. Cst. Grimshaw left the scene at 12:46 am, arriving at the Detachment with Mr. Roberts at 12:55 am.

[13] There was also video evidence from the "WatchGuard Video" from Cst. Grimshaw's police vehicle. The video went from when Cst. Grimshaw began following Mr. Roberts, showing Mr. Roberts driving and his vehicle being pulled over, Cst. Grimshaw's dealings with Mr. Roberts and the passenger at Mr. Roberts' vehicle, and the search of the vehicle. The Video was played in Court and entered as Exhibit 2.

[14] Cpl. Gavel also testified on the trial. Cpl. Gavel is a Qualified Breath Technician, and has been since 2015. Cpl. Gavel attended the Yellowknife RCMP Detachment on September 23, 2021, just after 1:00 am, where he was met by Cst. Grimshaw and Mr. Roberts. Cpl. Gavel introduced himself to Mr. Roberts, and confirmed with Cst. Grimshaw that Mr. Roberts did not wish to speak to a lawyer; Cpl. Gavel further confirmed that Mr. Roberts had no foreign substances in his mouth, and then explained to Mr. Roberts that he was a Qualified Breath Technician for the Northwest Territories, and he would be taking two samples of Mr. Roberts' breath. Mr. Roberts told Cpl. Gavel that he was refusing to provide samples of his breath. Cpl. Gavel explained to Mr. Roberts the consequences of refusing to provide a sample of his breath; Mr. Roberts maintained that he would not provide a sample of his breath. Cpl. Gavel then asked Mr. Roberts if Cpl. Gavel entered Mr. Roberts' information into the instrument and prepared it to receive a sample of Mr. Roberts' breath if he would still refuse, and Mr. Roberts' indicated he would. Cpl. Gavel had no further involvement with Mr. Roberts. Mr.

Roberts was charged with impaired driving and refusing to provide a breath sample and released that morning.

## C. ISSUES

### C.1 Was Richard Roberts' ability to operate a conveyance impaired by alcohol?

[15] From all of the evidence on this trial, I am not satisfied beyond a reasonable doubt that Mr. Roberts' ability to operate a conveyance was impaired by alcohol. The only evidence of possible impairment comes from Cst. Grimshaw who testified that he smelled alcohol coming from the vehicle, and that Mr. Roberts had a slight slur when he spoke. I listened for a slur in Mr. Roberts speech when watching Exhibit 1, and could not detect a slur. I do accept that Cst. Grimshaw was in a better position to detect a slur as he was dealing directly with Mr. Roberts. But a slight slur is not enough to establish any degree of impairment, especially when there is no evidence of erratic or unusual driving, no evidence of difficulty with coordination, walking, balance, etc.. Further Cpl. Gavel, who also had direct dealings with Mr. Roberts gave no evidence at all of any signs of impairment. Count number one on the information is dismissed.

### C.2 Did Richard Roberts refuse, without lawful excuse, to provide samples of his breath?

[16] Section 320.28 of the *Criminal Code* states:

If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under paragraph 320.14(1)(b), the peace officer may, by demand made as soon as practicable,

(a) require the person to provide, as soon as practicable,

(i) the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument, or

(ii) (not applicable to this case)

[17] Section 320.15(1) states:

Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28.

[18] A demand made pursuant to s. 320.28 must be made as soon as practicable. As soon as practicable does not mean as soon as possible, but it does mean within a reasonably prompt time. Cst. Grimshaw chose to deal with the passenger in the vehicle, and once that was done, to search the vehicle before attending to duties he had as a police officer who had arrested and detained an individual; Cst. Grimshaw had a duty to tell Mr. Roberts why he was arrested, he had a duty to advise Mr. Roberts of his right to counsel, and if it was Cst. Grimshaw's intention to demand breath samples, he had a duty to make that demand as soon as practicable.

[19] There was absolutely no reason at all for Cst. Grimshaw to carry out a thorough search of Mr. Roberts' vehicle, including under the hood and the trunk before advising Mr. Roberts of his right to counsel and making the breath demand. Cst. Grimshaw's evidence that Mr. Roberts' "had a phone with him that was working and he was able, if he wanted to in that moment, to call a lawyer while I was doing other things." is telling of Cst. Grimshaw's attitude towards Mr. Roberts' *Charter* rights especially considering that Cst. Grimshaw had not told Mr. Roberts that he could call a lawyer before Cst. Grimshaw did "other things", but also of his duty to make the breath demand as soon as practicable.

[20] When Cst. Grimshaw was asked why he did not wait to search the vehicle until after he told Mr. Roberts of his *Charter* rights, Cst. Grimshaw stated "It [the search] probably could have waited. I'll give you that." When asked essentially the same question about the breath demand, that being that it was not read to Mr. Roberts as soon as practicable, Cst. Grimshaw stated "When you're talking about the search of the vehicle, you might have a good point, I'll give you that."

[21] I also refer to Cst. Grimshaw's reasons for searching under the hood of Mr. Roberts' vehicle: when asked what he expected to find under the hood of the vehicle he testified "...other contraband or stolen property or drugs or weapons or something like that...".

[22] Though Cst. Grimshaw's evidence was that he was looking for evidence related to what he had arrested Mr. Roberts for, that is impaired driving, I do not accept that. If Cst. Grimshaw was looking for evidence of impaired driving, there would be no reason to search under the hood of the vehicle, no reason to search the trunk of the vehicle. Evidence found in either of those places would not be relevant to a charge of impaired driving. Further Cst. Grimshaw's comment to Cst. Ellis that "I got a feeling we're going to find something." also leads me to find that Cst. Grimshaw's search of the vehicle was unrelated to the charge that Mr. Roberts had been arrested for, and most certainly if necessary at all should not have taken priority over informing Mr. Roberts of his rights and making a formal breath demand.

[23] I find the breath demand made to Mr. Roberts was not made as soon as practicable, and being that an unreasonable search of Mr. Roberts' vehicle was carried out before the demand was made, the demand was not made within a reasonably prompt time.

[24] Being that the breath demand was not made as soon as practicable, it was not a valid demand made under section 320.28 of the Criminal Code, and therefore Mr. Roberts had a reasonable or lawful excuse not to comply with the demand. Count number two on the Information is dismissed.

---

B.E. Schmaltz  
Deputy Judge of the Territorial Court

Dated at Yellowknife, Northwest Territories,  
this 28<sup>th</sup> day of March, 2023.

*R. v. Roberts*, 2023 NWTTC 04

*Date: 2023 03 28*

*File: T-1-CR-2021-0001572*

---

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

---

**BETWEEN:**

**HIS MAJESTY THE KING**

**-and-**

**RICHARD STANLEY ROBERTS**

---

**REASONS FOR JUDGMENT  
of the  
HONOURABLE DEPUTY JUDGE  
B.E. SCHMALTZ**

---

[Sections 8 and 10(b) of the  
*Charter Application*]