Citation: *R. v. Beattie*, 2020 YKTC 15

Date: 20200605
Docket: 19-00154
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

KLINT KYLE BEATTIE

Appearances:
Benjamin Eberhard — Counsel for the Crown
Malcolm E. J. Campbell — Counsel for the Defence

RULING ON *VOIR DIRE* AND
REASONS FOR JUDGMENT

Introduction

[1] Klint Beattie is charged with six *Criminal Code* offences, namely: failing to comply with an approved screening device demand (s. 320.15(1)), uttering threats (s. 264.1(1)(a)), assaulting a peace officer (s. 270(2)), and three counts of being an occupant of a vehicle in which he knew there was a firearm (s. 94(2)).

[2] These offences allegedly occurred in Whitehorse on April 19, 2019. The Crown proceeded by way of summary conviction.

[3] The defence has brought two *Charter* applications, seeking an exclusion of evidence related to the refusal charge, based on a s. 10(b) breach and seeking

exclusion of evidence of the firearm charges based on a s. 8 breach. The defence also contests the uttering threats and the assault peace officer charges.

[4] The Crown led evidence from two police officers in a *voir dire*, and counsel agreed to a blended hearing whereby any admissible evidence led in the *voir dire* would become part of the trial proper. At the end of the Crown's case, the matter was adjourned for continuation. At the scheduled continuation date, the defence chose not to call evidence, and at the request of counsel, the matter was further adjourned for written submissions.

[5] This is my decision on both the *voir dire* and the trial.

Summary of the Relevant Facts

[6] On the evening of April 19, 2019, Cst. Kidd of the Whitehorse RCMP responded to a report of a possible impaired driver in the downtown area. Soon thereafter, he pulled over a truck travelling on Second Avenue based on the description of the suspect vehicle and driver. The interactions between Cst. Kidd and Mr. Beattie were captured on the in-vehicle WatchGuard recording system. The recording includes both audio and video throughout the investigation. This recording became an exhibit.

[7] Mr. Beattie displayed some agitation with the investigating officer as soon as he approached the truck. When advised of the reasons for the vehicle stop, Mr. Beattie denied having consumed alcohol recently. He suggested that the reason Cst. Kidd smelled alcohol from within the vehicle was that alcohol may have been spilled inside the vehicle. As a result, Cst. Kidd requested Mr. Beattie to exit the vehicle in an attempt

to pinpoint the source of the smell of alcohol. Cst. Kidd testified that he noted a light odour of alcohol on Mr. Beattie's breath once he exited the truck, and that he requested that Mr. Beattie provide a sample of his breath into an approved screening device ("ASD"). Mr. Beattie responded that he wanted to speak to a lawyer. The investigating officer explained to Mr. Beattie that he did not have a right to speak to a lawyer and that the request to provide a sample was not an option but a demand.

[8] At this time, a second officer, Cst. Hartwig, arrived on the scene to assist in the investigation and as backup to Cst. Kidd. He testified that Mr. Beattie was already out of his vehicle at that time, and that he was yelling and gesturing. Although Cst. Hartwig stood to the side to allow Cst. Kidd to investigate the matter, Mr. Beattie became focused on Cst. Hartwig and commented on his presence. The officer testified that as he told Mr. Beattie to listen to Cst. Kidd and pointed in that direction, the accused reached out and struck or slapped his arm. Cst. Hartwig conceded in cross-examination, after watching the video of this interaction, that he had, in fact, made contact with Mr. Beattie's arm.

[9] When Mr. Beattie made contact with the officer's arm, the officer warned Mr. Beattie that if he did that again, he would be arrested for assaulting a police officer. He testified that Mr. Beattie remained upset and agitated, and when he commenced moving towards Cst. Hartwig, the officer arrested him for obstruction. As those two officers held Mr. Beattie, a third officer exited his vehicle and placed the accused in handcuffs.

[10] Once the officers were able to place Mr. Beattie in a police vehicle, Cst. Kidd read him his *Charter* rights. Mr. Beattie indicated that he wanted to speak to his lawyer, however, he was only able to provide the lawyer's first name.

[11] The investigating officer, who had a screening device with him, also read Mr. Beattie a formal ASD demand. Cst. Kidd testified that he read the demand in several different ways, and that Mr. Beattie indicated that he would not perform the test. Cst. Kidd then arrested him for failing to provide a sample of his breath into an ASD.

[12] Cst. Hartwig testified that soon after Mr. Beattie's arrest, he started to yell about his dog in his truck. Cst. Hartwig and the third officer went to the truck to look for the dog. They did not find a dog, but on the floor of the back seat, they located three rifles.

Analysis

<u>Firearms</u>

[13] I find that it is unnecessary to make a ruling with respect to the *Charter* application to exclude the rifles seized from Mr. Beattie's vehicle. I do so because the Crown is unable to prove the s. 94(2) offences, even if the rifles are admissible in the trial proper.

[14] The Information alleges three counts of Mr. Beattie being an occupant of a motor vehicle in which he knew there was "a firearm, to wit: a rifle". All three charges are worded in this fashion, without anything further to specify the rifles as being those seized. Arguably, though, the Crown may be able to overcome this deficiency in the wording, as a description of the three rifles has been provided to the Court, and

continuity of these exhibits has been conceded. However, to complicate matters further, the police only tested one of the three rifles, which was determined to be a non-restricted firearm pursuant to s. 84(1) of the *Code*.

[15] As such, even if the lack of specificity in the wording of the firearm charges is not fatal, the lack of testing of two of the three rifles means that the Crown is unable to prove that those two rifles are firearms pursuant to s. 2 of the *Code*.

[16] That, however, does not end the matter. Mr. Beattie is charged under s. 94(2), the penalty section, for allegedly contravening s. 94(1), the relevant portion of which reads:

> 94 (1) Subject to subsections (3) and (4), every person commits an offence who is an occupant of a motor vehicle in which the person knows there is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, unless
>
> (a) in the case of a prohibited firearm, a restricted firearm or a non-restricted firearm,
>
> (i) the person or any other occupant of the motor vehicle is the holder of
>
> (A) a licence under which the person or other occupant may possess the firearm, and
>
> (B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it,
>
> …

[17] In order to prove a charge under this section, the Crown must establish that: (a) the item is a firearm; (b) the firearm was located in a vehicle and the accused

occupant knew it was there; and (c) neither the accused occupant nor anyone else in the vehicle had a licence or registration certificate (see Peter J. Harris and Mariam H. Bloomenfeld, *Weapons Offence Manual*, loose-leaf (Aurora, ON: Canada Law Book, 1990 -) Ch. 13-3).

[18] In the matter before me, there is no evidence as to whether Mr. Beattie had a licence for a non-restricted firearm on the date in question. The firearm offences for which he is charged do not fall into the category of offences where the accused maintains the onus of proving that they had an authorization, licence or registration certificate (see s. 117.11 of the *Code*). Where the onus of proof for this element of the offence rests with the Crown, courts have accepted such evidence on consent by way of affidavit of a firearms officer (see for example, *R. v. Chesnic*, 2019 BCPC 293, paras. 18-20, and *R. v. H.M.*, 2019 ONCJ 383, at para. 373). However, no such affidavit was filed in this case, nor was *viva voce* evidence called.

[19] As a result, the Crown is unable to satisfy me beyond a reasonable doubt that Mr. Beattie did not hold a valid firearms licence. Therefore, I find Mr. Beattie not guilty of Counts 4, 5 and 6.

Assaulting a Peace Officer

[20] It is alleged that Mr. Beattie assaulted Cst. Hartwig who was engaged in the execution of his duty, contrary to s. 270(2) of the *Code*.

[21] The offence of assault is defined in s. 265(1) of the *Code*. The relevant provision in the matter before me is s. 265(1)(a) which states:

A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
…

[22] The force applied may be a relatively minor force (*R*. v. *Palombi*, 2007 ONCA 486 at para. 28).

[23] Assault is a general intent offence (*R. v. George*, [1960] S.C.R. 871), whereas assaulting a police officer is a specific intent offence in that the accused must intend to apply force to a peace officer (*R. v. McLeod* , [1955] 111 C.C.C. 137 (B.C.C.A.), and *R. v. Vicko*, [1972] 10 C.C.C. (2d) 139 (O.N.C.A.)). Unless a defence applies, any intentional application of force is an assault.

[24] As set out in *R. v. Dawydiuk*, 2010 BCCA 162, at para. 29:

> Under s. 265(1)(a) of the *Criminal Code*, a person commits an assault when without the consent of another person, he applies force intentionally to that other person, directly or indirectly. In s. 265(1)(a), the word "intentionally" simply means, in the words of Ritchie J., "not done by accident or through honest mistake". …

[25] In *Palombi*, the Court considered the fault elements of assault:

> 34 … First, the application of force must be voluntary. Thus, the striking of someone through an involuntary reflex action is not an offence. For reasons that need not be explored here, voluntariness is an element of the *actus reus*, rather than the *mens rea*: see *R. v. Parks*, [1992] 2 S.C.R. 871 at 89. …
>
> 35 There is, of course, also a *mens rea* or fault element for the simple (common) assault offence. The force must have been applied intentionally. The touching that occurs due to the normal jostling that takes place in a crowded bus is a classic example of the unintentional or accidental application of force. …

[26] Mr. Beattie acted in an uneven and, at times, inappropriate manner over the course of his interactions with police during this investigation. Cst. Kidd displayed patience and self-control in his dealings with Mr. Beattie. His easy and straightforward manner appeared to calm Mr. Beattie down, although his behaviour deteriorated upon the arrival of the second officer. This officer, Cst. Hartwig, did not provoke Mr. Beattie in any fashion, but his presence resulted in increased agitation on the part of Mr. Beattie.

[27] Mr. Beattie's heightened state included his pointing a finger towards Cst. Hartwig as he complained about the number of police officers arriving on scene. Although Cst. Hartwig initially testified that when he extended his arm towards the accused, he was directing him to look at and engage with Cst. Kidd, he did acknowledge in cross-examination that he, in fact, "directed [Mr. Beattie's] hand". I understood this to mean that he moved or pushed Mr. Beattie's hand away from him, which is consistent with what is depicted in the video recording.

[28] The video footage shows that, in response, Mr. Beattie moves his arm upward and backward, and makes contact with the officer's extended arm. This interaction occurs over the course of a few seconds.

[29] I reiterate that Mr. Beattie's overall behaviour was obnoxious and unwarranted. I take no issue with the actions of the officers' use of force in ultimately arresting Mr. Beattie for obstruction. However, in considering the alleged assault, it is important to note that Mr. Beattie's arm movement is as consistent with his moving his hand up and away from the officer as it is with intentionally striking the officer.

[30] In all the circumstances, I have a doubt as to whether Mr. Beattie intended to hit the officer's arm, after the officer had pushed his hand downward.

[31] In any event, even if I had found beyond a reasonable doubt that the contact was intentional, I am mindful of the words of Faulkner J. in *R. v. Elek,* [1994] Y.J. 31 (Y.K.T.C.), with respect to the doctrine of *de minimis*.

> 24 In my view, much of the difficulty in applying the de minimis test is the usual English translation: "The law does not concern itself with trifles". I think a much better way to approach the task is to ask whether or not the conduct of the accused is sufficiently serious that it should properly be stigmatized as criminal. I recognize that this is hardly more precise than speaking of the conduct as being trifling or trivial, but I think that the words trifling and trivial can convey a pejorative message to the complainant which may not be warranted. An accused may be acquitted on de minimis grounds even though what happened is not considered by the court to be a "trifle", but is simply considered to be conduct that, while unacceptable and wrong, did not constitute criminal misconduct.
>
> 25 There is a second difficulty in the usual formulation of the de minimis concept. Surely, in considering whether or not the accused is guilty of criminal misconduct, the court can look not only at the magnitude of what happened, but at the motivation of the accused in doing what she did. I had earlier stated that "motive" is irrelevant to the question of intent in an assault case, as the only requirement is that the touching be intended, as opposed to being accidental. I do not, however, think that the motive of the accused is wholly irrelevant in determining whether or not the act complained of should be characterized as criminal. The difference between a congratulatory slap and an assaultive slap lies not so much in the amount of force used - they may be equal - but in the reason for the slap. Clearly, though the bare definition of an assault doesn't require it, a criminal assault is one motivated by some degree of animus or ill-will.

[32] Although, as indicated, Mr. Beattie's overall conduct was unacceptable and wrong, that part of his interaction with police did not, in my view, rise to the level of constituting criminal misconduct.

Uttering Threats

[33] Mr. Beattie is also charged with uttering a death threat to Cst. Kidd. However, I understand, based on the absence of written submissions in this regard, that the Crown is not seeking a conviction for this charge. This is appropriate considering that the alleged threat was not made in the presence of any person, and was only heard by police when they reviewed the video recording of Mr. Beattie in the back seat of the police vehicle.

[34] The *mens rea* of this offence, which speaks of "knowingly" uttering, bears a subjective intent component. As stated in *R. v. Noble*, 2010 MBCA 60, at para. 8:

> …It is not enough to merely utter the words which constitute the threat. The accused must utter the words with the intent that the threat be taken seriously or to intimidate. It does not matter whether the accused meant to carry out the threat. As a result, the trial judge must be satisfied that the accused meant that the words uttered would be taken seriously or would intimidate the complainant…

[35] As a result, I find Mr. Beattie not guilty of the uttering threats charge.

Refusal to Provide a Sample of his Breath into an ASD

Whether the s. 10(b) duty to "hold off" applied to the ASD demand

[36] Mr. Beattie's notice of *Charter* application seeks a remedy pursuant to s. 24 of the *Charter*, specifically that there be a judicial stay of proceedings based on an infringement of the accused's s. 10(b) rights (s. 24(1)), or alternatively that all utterances by Mr. Beattie purported to be a refusal to provide the sample after his arrest for obstruction be excluded (s. 24(2)).

[37] However, quite properly, the written submissions of the defence focus on the exclusion of Mr. Beattie's utterances of refusal to provide a sample of his breath.

[38] The law is settled that in the context of drinking and driving investigations, a limit on the right to counsel is prescribed during roadside screening demands, including the period of detention for a driver to comply with an ASD demand pursuant to s. 254(2) of the *Code* (*R. v. Thomsen*, [1988] 1 S.C.R. 640; and *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37).

[39] Courts have held that the limit on the right to counsel in screening demand cases does not extend to situations where the police are waiting for the device to be brought to the scene and there is a realistic opportunity for the suspect to consult with and receive advice from counsel (*R. v. George*, [2004] 189 O.A.C. 161 (O.N.C.A.); and *R. v. Torsney*, 2007 ONCA 67).

[40] The defence contends that the above-noted case law should inform Mr. Beattie's situation in that he was not only detained for the drinking and driving investigation, but was also under arrest for another offence. Therefore, the officer's priority should have been to implement his right to counsel by way of cellphone prior to proceeding any further with the ASD process.

[41] However, I fail to see how the case law involving access to counsel prior to submitting to an ASD test, where the device is not readily accessible, assists Mr. Beattie. Cst. Kidd testified that he had a device in his police vehicle. The circumstances of this matter do not raise the question of the validity of the ASD demand where the test cannot be administered immediately.

[42] In support of the argument that the police should have provided Mr. Beattie with the opportunity to contact counsel due to his arrest for obstruction, the defence points to the decision in *R. v. Diruggiero*, [1998] 52 C.R.R. (2d) 132 (B.C.S.C.). In that case, the investigating officer made an ASD demand following an arrest for impaired driving and after providing the suspect with his right to counsel. However, the Court in *Diruggiero* found that the ASD demand was improper and not within the legislative purpose of s. 254(2), as the investigating officer was seeking to "extract incriminating evidence" to support the impaired driving charge. The Court also found that the officer made the demand for expediency purposes, believing that the accused would refuse to comply, and thus avoiding having to take the accused to the police station. As a result, the Court held that there had been an infringement of the accused's right to counsel. I do not find this decision to be helpful.

[43] However, the recent decision in *R. v. Commisso*, 2020 ONSC 957, is on point. Police arrested the accused for breaching a term of his Undertaking, and subsequently made an ASD demand. Mr. Commisso argued that the police should have held off on the roadside ASD demand, once he was under arrest for the breach charge, until he had exercised his right to counsel.

[44] The Court found that there was no duty to "hold off" from making the ASD demand, and that therefore there were no *Charter* violations. At para. 37, the Court states:

> …As a matter of logic and criminal law policy, it appears to make little sense because it places an accused like Commisso, who is alleged to have committed additional offences (beyond drinking and driving), in a better position than an accused who is only alleged to have been drinking

> and driving. It also attaches undue significance to the exact order in which the police proceed when investigating an accused who has allegedly committed multiple offences. Finally, it ignores the fact that the ASD results cannot be used in "evidence" at trial.

[45] Code J. expands upon the issue of criminal law policy at para. 44:

> …[The policy] is concerned with the danger posed by drinking and driving and the need to facilitate timely and proportionate roadside investigations in these cases. It cannot be correct that more aggravated forms of drinking and driving (for example, those that include ss. 249 and 252 offences), or that drinking and driving offences that are followed by obstruction (contrary to s. 129), cannot be investigated in the same way as drinking and driving *simpliciter*. They are all subject to the same public policy that justifies timely and proportionate roadside screening of the driver for excessive alcohol consumption.

[46] And with respect to the order in which police proceed when investigating an accused for multiple offences, Code J. states, at para. 46:

> …there will often be sound law enforcement reasons to immediately arrest for a subsequent offence, such as obstruct police, leaving the scene of an accident, dangerous driving, possession of drugs or firearms, or breach of an undertaking, as in the present case. In all these cases, the investigating officer will generally have direct evidence of the subsequent offence and will immediately have a basis to arrest. On the other hand, drinking and driving offences almost always require further investigation before the grounds to arrest may eventually emerge. It makes sense from a law enforcement perspective to immediately arrest and take control of the accused, where grounds to arrest exist, and then carry on investigating other offences. Second, from the perspective of protecting the rights of the accused, it is important not to delay making an arrest where sufficient grounds already exist. The arrest triggers important informational duties, set out in ss. 10(a) and 10(b) of the *Charter*, which immediately inform the accused of the present extent of his/her jeopardy and the existence of certain rights. …

[47] I accept and endorse the reasoning and statements of the law in *Commisso* and apply them to the matter of Mr. Beattie. Cst. Kidd acted in accordance with the law in

arresting Mr. Beattie for obstruction, complying with the informational component of s. 10(b) in relation to his arrest, and then proceeding with the formal ASD demand.

[48] In the result, I find that there was no s. 10(b) *Charter* violation.

Validity of the ASD demand

[49] The defence also submits that the ASD demand was unlawful, as Cst. Kidd possessed reasonable grounds to believe that Mr. Beattie had committed a drinking and driving offence, and therefore there was no reason to use an ASD to establish his grounds for a breathalyser demand. As a result, it is argued that the ASD demand was unlawful.

[50] Cst. Kidd testified that he believed that he had strong grounds to suspect that Mr. Beattie operated a motor vehicle while having consumed alcohol. These grounds were based on the following: a report that he had received of a possible impaired driver who had been stunting and who matched the description of Mr. Beattie; the irregular left turn that Mr. Beattie had made while being pulled over; some slurring of his words; and his application of lip balm which the officer believed he may have done to mask the smell of alcohol. Also, Cst. Kidd agreed with defence counsel that Mr. Beattie's general behaviour towards the police was consistent with someone who is intoxicated.

[51] Cst. Kidd indicated that he was concerned that these grounds were not sufficient objectively to raise his reasonable suspicion to reasonable grounds to believe. His concern arose from his reading and interpretation of case law, in this jurisdiction in particular, where arguably stronger grounds were found to be insufficient objectively to

support reasonable grounds for a breathalyser demand. The officer testified that Mr. Beattie was displaying certain symptoms subtly and he would have wanted to see more pronounced symptoms before concluding that he had reasonable grounds to believe that Mr. Beattie operated his vehicle while his ability to do so was impaired by alcohol.

[52] After a careful review of the evidence before me, I take no issue with the manner in which Cst. Kidd proceeded. His use of the ASD was appropriate in all of the circumstances. His acknowledgement in cross-examination that, in retrospect, an argument could be made that he had reasonable grounds to make a breathalyser demand underscores, in my view, the difficulty that police face in the heat of the moment in determining whether they have a reasonable suspicion for an ASD demand or reasonable grounds for a breathalyser demand. In this investigation, the officer decided that the use of the ASD as an investigative tool was necessary to clarify his grounds and, in all the circumstances, I do not find that he was at fault.

[53] Therefore, I find Mr. Beattie guilty of the refusal charge.

CHISHOLM C.J.T.C.