

Citation: *R. v. Butler*, 2024 YKTC 28

Date: 20240816
Docket: 22-00294
22-00294F
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Schneider

REX

v.

RANDY WADE BUTLER

Appearances:
Madeleine Williams
Gregory Johannson-Koptyev

Counsel for the Crown
Counsel for the Defence

RULING ON *VOIR DIRE*

[1] Mr. Butler is charged with one count of aggravated assault and three counts of assault arising from an incident, described as a “bar fight”, on August 6, 2022, in the City of Whitehorse, Yukon.

[2] The Crown brings an application to have a statement made by the accused, Mr. Butler, to P.C. M. Cook (“the officer”), admitted into evidence as voluntarily made. The officer was the only witness called at this *voir dire*.

[3] After telephone communication with the officer, Mr. Butler turned himself in on August 12, 2022, as requested, and was arrested at the Whitehorse RCMP Detachment. The officer provided Mr. Butler with the standard police caution, reading from his RCMP-issued “*Charter* card”. At 11:52 a.m. the officer advised that he would be taking a “custodial statement” from Mr. Butler. After initially declining the assistance of counsel, Mr. Butler exercised his right to counsel at 11:55 a.m.

[4] Mr. Butler had reconsidered his decision to speak with his lawyer after discussing his situation with the officer. It was confirmed that he was indeed facing serious charges. The officer then returned to the question of whether or not he would like to speak with counsel and Mr. Butler decided that he should exercise that right. Mr. Butler appeared to be acutely aware of his jeopardy. Upon returning to the interview room, after speaking with counsel in the “lawyer call room” for approximately five minutes, a dialogue began between the officer and Mr. Butler at 12:02 p.m. Throughout the interview Mr. Butler maintained that, while he was present, he did not participate in any violent activity other than to try to break up the fight, which appeared to be a barroom brawl; “...there was lots of booze. There was a shit ton of fucking people.” Mr. Butler mentioned others who may have been responsible and also provided the officer with “Snapchat” video depicting the scene.

[5] The audio-visual recording of the interview confirmed that it proceeded in a very amicable manner. Toward the end, Mr. Butler, apparently surprised, asked if their session had been recorded. This was confirmed by the officer who told Mr. Butler that he was advised of the recording at the outset of the interview. Mr. Butler indicated “It’s all good. I don’t care. I truly don’t care. There’s nothing to hide. It’s, it’s how it was.”

Thereafter, Mr. Butler continued repeating that he was not involved and that he was going to clear his name. The interview ended at 12:24 p.m.

[6] It is not contested that Mr. Butler knew he was speaking to a “person in authority”. The officer was in uniform and identified himself as a police officer. In his testimony at the present hearing, the officer indicated that Mr. Butler was respectful, calm, sober, and coherent. Mr. Butler was not restrained. Though communications between the officer and Mr. Butler prior to the interview were unfortunately not recorded (neither of two recorders were working which the officer conceded “...was a problem”), the officer indicated that he made no threatening gestures, promises, or inducements to Mr. Butler; nor was it suggested to the officer during his cross-examination that any untoward gestures or dialogue took place prior to the interview. Mr. Butler was described as talkative and friendly. This was consistent with Mr. Butler’s presentation as depicted during the audio-visual recording of the interview. The officer had no specific memory of any dialogue between himself and Mr. Butler prior to the recorded interview. They may have conversed. The officer cannot recall whether or not food or water was offered to Mr. Butler prior to the interview or after. It was not put to the officer that discussions regarding food or water had or had not occurred. It was not put to the officer that any threats, promises, inducements, or any improper utterances were made during the time of any unrecorded conversations.

[7] In cross-examination the officer agreed that his report dated “August 11, 2022”, contained information obtained subsequent to that date and that reports can be edited/altered/added-to after the date indicated on the report.

[8] The Crown submits that Mr. Butler's statement was made freely and voluntarily after obtaining legal advice. Further, there were no threats or promises made. The interview was not conducted in an oppressive environment and no trickery was employed. Mr. Butler had an "operating mind". The officer indicated that if Mr. Butler was willing to provide his account of the event, he would like to hear his side of the story. Mr. Butler appeared keen to assert his innocence although, toward the end of the interview, he appeared to be surprised that the conversation had been recorded. He continued discussions with the officer, nevertheless.

Argument

[9] The Crown relies entirely upon the Supreme Court of Canada's decision in *R. v. Oikle*, 2000 SCC 38. In Mr. Butler's case, the accused is not making a "confession" *per se* but is, rather, protesting his innocence. Nevertheless, the same principles apply in establishing the voluntariness of the statement. The Crown has the burden of establishing beyond a reasonable doubt that the statement was made voluntarily. Typically, it must be established that the accused had an operating mind at the time the statement was made, that they were aware that they were speaking to a person in authority, that no trickery or deception was employed, and that no threats, promises, or inducements were made.

[10] Counsel for Mr. Butler points to a number of factors, including those below, as defeating the Crown's assertion that the statement was made voluntarily:

- 1) an insufficiency in the arrest record;

- 2) failure to record any conversations made prior to the making of the statement; and
- 3) Mr. Butler either not knowing or forgetting that the statement was being recorded.

[11] Counsel for Mr. Butler relies upon two cases, other than *Oikle*, to support the argument that the totality of the above circumstances (a “constellation of factors”) served to undermine a finding that the statement was made voluntarily. The first case is *R. v. Moore-McFarlane* (2000), 56 O.R. (3d) 737 (C.A.). This decision speaks, *inter alia*, to the growing trend in recording police interactions with accused. Though Mr. Butler’s case is not a “confession case”; nor is it a case where the statement was not recorded, I agree with counsel for Mr. Butler that all interactions with the officer and the accused, including any made preceding the recorded statement, should have been recorded. And, while the Crown bears the onus of establishing a sufficient record of the interactions between the suspect and the police, I am of the view that failure to record those interactions is not necessarily fatal to the Crown meeting that onus. It was not put to the officer or suggested that the failure to record was deliberate. The officer had apparently reported equipment failures of this sort in the past and was not aware of the malfunction at the relevant time. Not that “good faith” is an answer.

[12] The case of *R v. Bouthillette*, 2024 BCSC 1205 is, once again, a “confession case”. This is not a case where there is a suggestion that Mr. Butler’s will was overborne. There were not oppressive circumstances, police interference, or badgering that could be said to have undermined Mr. Butler’s free will. The officer did not

challenge Mr. Butler's decision to speak to counsel or the advice he had been given; rather, he facilitated the conversation. At no point did Mr. Butler request that the interview end. The case of *Bouthillette* is so dissimilar as to be unhelpful.

[13] That the report dated April 11, 2022, contained information obtained subsequent to that date was not developed as an important irregularity that could have had a bearing on the voluntariness of Mr. Butler's statement.

Conclusion

[14] I am of the view that the Crown has established that the statement provided by Mr. Butler was not the result of a fear of prejudice or a hope of advantage; nor was any influence of that sort put to the officer or suggested during his cross-examination. The accused, Mr. Butler, did not express a disinclination to speak with the officer after speaking with his counsel. This was not a "stress-compliant" situation where the accused produced a statement in order to escape an adverse or oppressive situation. The officer did not put scenarios to Mr. Butler that he pressured him to endorse. It could not be said that over the course of a 22-minute interview Mr. Butler had been deprived of sleep, food, or water. Nor was such a hypothetical put to the officer. Mr. Butler knew what he was saying and to whom he was speaking. By all appearances, he had an operating mind. Nor was it suggested otherwise.

[15] That Mr. Butler was unaware that the statement was being recorded, to my mind, does not logically undermine the voluntariness of his making the statement; only that he was unaware that it was being recorded. Secondly, after Mr. Butler *did* become aware that he was being recorded he continued in the same vein protesting his innocence

much as he had throughout. The evidence is that Mr. Butler received legal advice and upon receiving that advice proceeded to make a statement to the officer. And he continued with the statement after the recording issue came to light.

[16] In considering all of the evidence adduced at this *voir dire*, I am of the view that the Crown has met the onus with respect to establishing the voluntariness of Mr. Butler's statement. He was aware of what he was saying and to whom he was speaking. He had an "operating mind". After speaking with counsel, Mr. Butler engaged in a dialogue with the officer during which he protested his innocence. He was keen to give his side of the story. While he apparently became aware that their conversation was being recorded, Mr. Butler indicated that "Its all good. I don't care. I truly don't care. There's nothing to hide. It's, it's how it was."....and, continued the conversation. The Crown has met the burden.

SCHNEIDER T.C.J.