Citation: *R. v. D.R.,* 2024 YKTC 37

Date: 20241002
Docket: 22-00216
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

D.R.

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Leo Lane — Counsel for the Crown
Kevin Drolet — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] D.R. is before the Court facing two counts contrary to s. 271 of the *Criminal Code* and two counts contrary to s. 162(1)(c) of the *Criminal Code*. All four counts are alleged to have occurred on or between January 1, 2022 and March 31, 2022, at or near the City of Whitehorse in the Yukon territory.

[2] The trial commenced with a *voir dire* for the purpose of the Crown proving the voluntariness of a statement by D.R. given to the RCMP on July 8, 2022, (the

"Statement") shortly after his arrest. The *voir dire* took place July 26, 2024, with the trial set to continue for three days commencing December 4, 2024.

[3] The Crown has the burden on the *voir dire* to prove the voluntariness of the statement beyond a reasonable doubt. The Crown presented two RCMP officers, Cst. Daniel Van der Linden and Cst. Karina Moore. D.R. testified on his own behalf.

[4] The facts leading up to taking the Statement involve D.R.'s estranged partner, A.S., attending at the Whitehorse RCMP station on July 6, 2022, and providing a statement to Cst. Moore outlining the allegations. A.S. and D.R. share a young daughter together but were living apart on the date that the complaint was made.

[5] Based on the statement from A.S., Cst. Moore formed the grounds to arrest D.R. for the charges currently before the Court. She formulated a plan to arrest D.R. on the evening of July 8, 2022, shortly after 9:00 p.m., which was a Friday. She was aware that D.R. would be caring for his infant daughter on that date and would be home. Arrangements were made by Cst. Moore to have A.S. attend at the residence after the arrest to care for the child. The rationale for the Friday evening arrest was to ensure that D.R. would be before the Court at 10:00 a.m. on Saturday, as opposed to 1:00 p.m. on a weekday, to minimize the disruption to his work schedule.

[6] On July 8, 2022, Cst. Moore made arrangements with Cst. Van der Linden to assist in making the planned arrest. They travelled together in one police vehicle to the residence of D.R., arriving at approximately 9:15 p.m. D.R. answered the door, stepped out of the house at the request of the officers, and once outside was advised that he was being placed under arrest. D.R. was escorted back into the residence to collect

some personal items prior to being escorted to the police station. He was advised by Cst. Moore that Cst. Van der Linden would remain at his residence with the child until a care provider attended. D.R. gave Cst. Moore the phone number for his mother and asked that she be the care provider for his daughter in his absence. He was not advised at that time that arrangements had already been made for A.S. to attend and care for the child.

[7] D.R. was transported to the Whitehorse Correctional Centre, Arrest Processing Unit (the "APU"). During the transport the following exchange took place between Cst. Moore and D.R., captured on the Watchguard audio and video system in the police vehicle:

> D.R.: Is somebody staying there, or?
>
> Cst. Moore: No, they are going to look and get into contact with a safe adult for A. for the night.
>
> D.R.: Ok. So, I'm not going to be going back home tonight I take it?
>
> Cst. Moore: At this point in time, we don't have a timeline right now for you.

[8] At this time, D.R. appears concerned about the care of his daughter as well as what is going to happen to himself. The exchange leaves ambiguity as to his future custody status. Clarification regarding the care for his daughter, which had been planned well before the arrest, was not provided to D.R. until he was in the interview room during the Statement, a couple of hours later.

[9] At the APU, D.R. was given access to counsel and lodged in cells until Cst. Moore retrieved him in order to take the Statement. Nothing in relation to the

lodging of D.R. is of concern in relation to the voluntariness of the statement. Defence counsel conceded that the conditions in which D.R. was held were not oppressive.

[10] D.R. was retrieved from the holding cell at 11:22 p.m. and escorted to an interview room by Cst. Moore for the purpose of taking the Statement. There were three exchanges during the Statement between Cst. Moore and D.R. regarding his desire to speak to his lawyer and to not provide a statement. After the third exchange, which defence counsel argues constitutes an inducement to D.R. by Cst. Moore to provide a statement, D.R. cooperates and provides the Statement in response to the allegations against him.

[11] The Statement was reduced to a transcript which included numbered lines beginning at line 1 on page 1 and ending at line 549 on page 24. The first exchange that is relevant to the argument raised by D.R. regarding voluntariness starts on page 4 at line 88:

> Q: There’s always 2 sides to every story so that's what I wanna get from you tonight. I just wanna hear your side of the story and what's going on.
>
> A: Yeah, well, I mean, it's a big misunderstanding whatever is going on and so, you know, I'm-honestly, I just kinda would rather wait to talk to a lawyer and see what's going on from their end and what options are 'cause, you know, I'm just kind of taken aback by this. I was not expecting to be thrown in a cell on a Friday night when I'm supposed to be taking care of my daughter. So.

[12] The second exchange that is relevant to the argument raised by D.R. regarding voluntariness starts on page 6 at line 133:

> Q: Is there anything about those that you wanna tell me now, here? 'Cause like I said, like, I just wanna-if you're saying it's a big misunderstanding, then te-what am I misunderstanding?
>
> A: Well I mean, you've heard her side and I would rather just tell mine to a lawyer, to be honest. So.

[13] The third exchange that is relevant to the argument raised by D.R. regarding voluntariness, which includes the alleged inducement, starts on page 7 at line 149:

> Q: Um, yeah, like, I'm just trying to figure out what actually went on.
>
> A: Yeah. Yeah, but I just-I - it's is it gonna do anything for me tonight if I give you my side of the story, probably not, i mean, I'm gonna have to wait to talk to a lawyer and then talk about bail in the morning and then go on with court, r-regardless of what you hear right now, right, so.
>
> Q: Well my investigation, I'll be putting forth recommendations for conditions on release so it's up to you whether or not you wanna talk to me and I just give recommendations, I don't decide them, right. It will be the judge who's going to decide it, but it's whatever you wanna tell me, really.

[14] During this exchange, D.R. is asking Cst. Moore what benefit he would receive in exchange for cooperating with the Statement, and Cst. Moore responds in a manner that suggests that his cooperation will result in her giving positive recommendations to the presiding Judge at his pending bail hearing.

Evidence of D.R.

[15] On July 8, 2022, D.R. put his daughter to bed at about 7:00 p.m., cleaned up the kitchen, watched some TV, and was almost ready for bed when the RCMP arrived at his home and arrested him. By the time he was retrieved from the cell to provide a statement he was exhausted, nervous, and unsure about what was going on. He was

particularly scared about his daughter and who was caring for her as he was not aware of who the RCMP contacted.

[16] D.R. exercised his right to remain silent on the occasions noted in the Statement, but as soon as Cst. Moore told him that she makes recommendations for bail, he felt pressure to cooperate in order to have a better outcome. He had his daughter in mind and wanted to do what was best to see her and spend time with her. He had refused to say anything multiple times before Cst. Moore indicated that she will be making recommendations on bail, and he felt like he had no other choice in the circumstances but to give his statement. D.R.'s understanding was that the recommendations were regarding being put on bail and leaving confinement, and hopefully not having his daughter taken away from him. He wanted the best outcome in the circumstances.

[17] D.R. confirmed that his daughter was his number one priority and not being there for her scared him. He was concerned that she would be frightened to wake up and not have him there. Given her age, she gets distraught when he leaves her for any reason.

[18] Under cross-examination it was revealed that D.R. is an intelligent man who was read an understood his rights. He was also provided access to counsel prior to giving the Statement. He was told A.S. was caring for his daughter prior to the alleged inducement, and knew she was safe. He confirmed that he did not know what was meant by the reference to "recommendations", but he was scared to think he might remain in custody and have his daughter removed from his care.

[19] Regarding the reference by Cst. Moore in relation to cooperating with the Statement that it was "up to you", he did not believe her at that point because he had

declined to talk to her a couple of times already and the officer was not accepting his decision. When asked what conditions he was scared of, if released, he referenced the loss of contact with his daughter, the loss of his job, and the loss of his rights to his daughter.

[20] D.R. believed he had to be compliant in order to get positive recommendations from the officer. Cst. Moore did not seem to take his objections seriously and he believed that his only choice for a positive outcome with bail was to comply.

Application of the Law on Voluntariness

[21] The Supreme Court of the Northwest Territories addressed voluntariness in the recent decision of *R. v. Cayen*, 2023 NWTSC 18, at paras. 38, and 40 to 42:

> 38 Inducements, whether they are threats or promises, can have the effect of convincing an accused person to give a statement to the police. Not all inducements are improper. As stated in *Oickle* at para 57, the actions of the police become improper only when inducements, "whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne."
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> …
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> 40 Inducements can be overt or subtle. Whether an inducement is overt or subtle is not a determining factor in deciding if it is improper. An overt inducement may be proper and a subtle inducement can be inappropriate. What is important is the effect of the inducement and other factors on the accused's decision to speak to the police. It is a contextual analysis.
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> 41 In considering whether the accused's will has been overborne, an important consideration is whether there is a *quid pro quo* offered by the police, whether it is a promise or a threat. It is the strength of the inducement, taking into account the accused and his particular circumstances, that is considered in the overall contextual analysis of the voluntariness of the accused's statement. *R v Spencer,* 2007 SCC 11 at para 15.

> 42 The focus of the inquiry is an objective examination of the conduct of the police and its effect on the accused's ability to exercise free will taking into account individual characteristics of the accused. *Singh,* para 36.

[22] The decision of the Supreme Court of Canada in *R. v. Spencer*, 2007 SCC 11, as referenced in *Cayen*, addressed the assessment of a *quid pro quo* at paras. 13 and 15:

> 13 With respect to promises, which are at issue in the present appeal, this Court has recognized that they "need not be aimed directly at the suspect . . . to have a coercive effect" (*Oickle*, at para. 51). While Iacobucci J. recognized in *Oickle* that the existence of a *quid pro quo* is the "most important consideration" when an inducement is alleged to have been offered by a person in authority, he did not hold it to be an exclusive factor, or one determinative of voluntariness. On the contrary, the test laid down in *Oickle* is "sensitive to the particularities of the individual suspect" (para. 42), and its application "will by necessity be contextual" (para. 47). Furthermore, *Oickle* does not state that any *quid pro quo* held out by a person in authority, regardless of its significance, will necessarily render a statement by an accused involuntary. For example, an offer of psychiatric or psychological assistance, although "clearly an inducement, . . . is not as strong as an offer of leniency and regard must be had to the entirety of the circumstances" (para. 50). Inducements "become improper only when . . . standing alone or in combination with other factors, [they] are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne" (para. 57).
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> …
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> 15 Therefore, while a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement.

[23] I found Cst. Moore to be a credible witness and accept her evidence that it was not her intention to induce D.R. to cooperate with the Statement by promising to assist him in the bail process. That said, it is the words that she used, as viewed objectively in light of the circumstances of D.R., that must be considered. D.R. asked her if there was any benefit to him in relation to being released on bail by cooperating with her and

providing a statement. In response, it is a reasonable interpretation of the words uttered that she answered in the affirmative.

[24] As a police officer, Cst. Moore would have considerable knowledge of the bail process in the Yukon and could have provided a clear description of the process to D.R. during this exchange. She elected not to do so, leaving the comments open to interpretation by D.R. who had little to no understanding of the process.

[25] The Ontario Superior Court of Justice addressed the promise of bail as an inducement in *R. v. Scott*, 2023 ONSC 3746, at paras. 18 and 19:

> 18 The officer's monologue threatened prejudice if Mr. Scott chose not to speak. Do not talk, do not get bail. Talk, get bail. This was a false dichotomy or, at the very least, a grossly overstated one. Whether a person confesses may have some limited impact on bail release. But it was clear at this early stage that the material was found on multiple devices in Mr. Scott's possession. The fact is, Mr. Scott would inevitably have been released on bail given that he was a first offender and in light of the other circumstances. On the evidentiary foundation apparent on this record, the prospect of no bail was a false threat conjured up by the officer to get Mr. Scott talking.
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> 19 Framed in the parallel language of the right to remain silent, the free choice to talk or not was compromised by the stark ultimatum the officer imposed: *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp. 176-177; *R. v. Whittle*, [1994] 2 S.C.R. 914. Inducements vary in their power and impact on a detainee. But there are few more powerful inducements upon initial detention than the prospect of bail. A detainee anxiously anticipates the end of his or her detention and release from custody. It is a matter of absolute first priority. As a result, dangling liberty as a potential reward for talking is one of the most powerful tools to get a detainee to talk about the allegations against him or her. What makes it so effective, however, also makes it an improper inducement.

[26] The exchange in question in the Statement, and particularly the answer from Cst. Moore, left ambiguity regarding the likely outcome of the bail proceedings the next

morning. Given D.R. did not have a record, was gainfully employed, and was raising his infant daughter, it was inevitable that he would be released on bail. Cst. Moore's ambiguity regarding what was going to happen left D.R. frightened that he may not be released, or that if released he may not receive favourable conditions.

[27] The Crown is required to prove the voluntariness of the Statement on a standard of proof beyond a reasonable doubt, the same standard for the finding of guilt in *Criminal Code* cases. The principle of innocent until proven guilty and the standard of proof beyond a reasonable doubt is set out at length in *R.* v. *Nyznik*, 2017 ONSC 4392. In its review, the Court confirms that the jury instruction set out by Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320, remains the standard instruction on reasonable doubt given to criminal juries throughout Canada, as follows:

> 39 ...
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> ...
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> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[28] D.R. testified on his own behalf before the Court during the *voir dire* and the parties agree that this Court must apply the three-step procedure as set out by the Supreme Court of Canada in *R. v. W.(D.)* [1991] 1 S.C.R. 742, which states:

> 28 ...
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> ...
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> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
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> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[29] D.R. was subject to a thorough cross-examination by Crown counsel. He answered the questions asked of him and did not waiver in his position that he believed that cooperating with Cst. Moore and answering her questions would benefit him the following morning when he would be before the Court to address bail. On the first two steps of *W(D)*, I do not fully reject his testimony and accept that his cooperation with the Statement was on the belief that it would result in favourable recommendations by the RCMP to the presiding Judge at his bail hearing. I accept that D.R. understood the exchange to constitute a *quid pro quo*, and that his understanding was reasonable given the circumstances.

[30] On the assessment of proof beyond a reasonable doubt as described in *Nyznik*, applied to voluntariness, and applying the test in *W(D),* I find that the Statement provided by D.R. to Cst. Moore on July 8, 2022, was not voluntary and is inadmissible at trial.

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PHELPS T.C.J.