COURT OF APPEAL OF YUKON

Citation: *R. v. Driedger*,
2017 YKCA 9

Date: 20170620
Docket: 16-YU778

Between:

Regina

Respondent

And

Abram Driedger

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

On appeal from: An order of the Supreme Court of Yukon, dated February 29, 2016 (*R. v. Driedger*, 2016 YKSC 14, Whitehorse Docket 15-AP014).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	A. Porteous
Place and Date of Hearing:	Whitehorse, Yukon May 19, 2017
Place and Date of Judgment:	Vancouver, British Columbia June 20, 2017

Written Reasons by:
The Honourable Madam Justice Tulloch

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald

Summary:

Mr. Driedger appeals the summary conviction appeal judge's dismissal of his appeal of convictions for contravening firearms storage regulations and possession of a restricted firearm in an unauthorized place. He says the judge erred in not excluding the evidence seized under s. 24(2) of the Charter. Held: leave to appeal granted, but appeal dismissed. The summary conviction appeal judge erred in minimizing the seriousness of the s. 8 Charter breach based on the availability of regulatory powers. However, applying the framework in R. v. Grant, 2009 SCC 32, the court declined to disturb the judge's decision not to exclude the unlawfully obtained evidence.

Reasons for Judgment of the Honourable Madam Justice Tulloch:

OVERVIEW:

[1] Mr. Driedger appeals the summary conviction appeal judge's decision dismissing his appeal on convictions for contravention of firearms storage regulations and possession of a restricted firearm in an unauthorized place under ss. 86(2) and 93(1)(c) of the *Criminal Code,* R.S.C. 1985, c. C-46 (the "*Code*"), respectively.

[2] He argues that the judge erred in law by not excluding the evidence seized under s. 24(2) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Charter*").

[3] He seeks to have this Court overturn this holding, find that the evidence should have been excluded and enter an acquittal pursuant to s. 686(2)(a) of the *Code*.

FACTS:

[4] Mr. Driedger was driving on the Alaska Highway when he was stopped at a roadblock being conducted by the RCMP in conjunction with at least one conservation officer with authority under the *Wildlife Act*, R.S.Y. 2002, c. 229 (the "*Act*").

[5] A conservation officer, C.O. Piwek, went to Mr. Driedger's window and asked if he had any firearms. Mr. Driedger responded that he had firearms in the trailer that he was pulling with his truck. RCMP officer Cst. Kidd was present at the scene.

[6] The officer then noticed a gun case on the floor behind the driver's seat of the truck. He pointed out the case to Mr. Driedger and asked him to unlock the back door so he could verify whether there was a firearm in the case.

[7] Mr. Driedger complied but remained in the driver's seat. The officer opened the back door, took the case out and opened it. He found a handgun, an unloaded magazine and two loaded magazines. Cst. Kidd arrested Mr. Driedger, who was later charged and released at the roadside.

RULING OF THE TRIAL COURT:

[8] At trial Mr. Driedger applied to have the handgun evidence excluded on the basis that it was a breach of his s. 8 *Charter* rights and that it ought to be excluded under s. 24(2) of the *Charter*.

[9] On September 30, 2015, the trial judge dismissed the application. He found that the conservation officer exceeded his authority under s. 136(1) of the *Act*, such that the search infringed s. 8 of the *Charter.* However, the trial judge found that the evidence should not be excluded because the *Charter*-infringing conduct was insufficiently serious.

[10] He based this conclusion on his finding that Mr. Driedger consented to the search by unlocking his door.

[11] The trial judge issued his reasons for judgment on the same day and convicted Mr. Driedger on both counts in the information. The trial judge fined him $400 and applied the 30 percent victim fine surcharge.

RULING OF THE SUMMARY CONVICTION APPEAL COURT:

[12] Justice Veale heard Mr. Driedger's appeal from convictions and on February 29, 2016, issued his reasons for judgment.

[13] He began his analysis by outlining the three issues at stake on appeal: (1) whether the correctness standard of review applied; (2) whether Mr. Driedger consented to the search of his vehicle and the gun case; and (3) whether the handgun should be admitted into evidence under s. 24(2) of the *Charter*.

[14] With respect to Mr. Driedger's consent, he considered whether the trial judge properly applied the legal test for consent from *R. v. Dhillon*, 2012 BCCA 254, 191 C.C.C. (3d) 93, since Mr. Driedger never gave express consent.

[15] Justice Veale concluded that the trial judge erred in finding consent on either the correctness or palpable and overriding error standard. In the absence of valid consent, the conservation officer's search was unlawful.

[16] Turning then to s. 24(2) of the *Charter*, Justice Veale set out the framework for the admissibility of unlawfully obtained evidence from *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.

[17] He found that the conduct of the conservation officer was a minor violation of Mr. Driedger's *Charter* rights.

[18] He noted that the conservation officer could have relied on the warrantless search power under the *Act* in appropriate circumstances but acknowledged that neither counsel argued this provision.

[19] Next, he concluded there was no significant intrusion on Mr. Driedger's privacy rights because the search amounted to the officer removing an item in plain sight. Also, it was an item that he could have required Mr. Driedger to produce under s. 136 of the *Act*.

[20] Finally, he noted the reliability of the evidence and its enhancement of the truth-seeking function of the trial under the third factor outlined in *Grant* (at paras. 79-84).

[21] Ultimately, Justice Veale concluded that while the trial judge erred in finding that Mr. Driedger consented to the search, he would not interfere with the trial judge's decision to admit the handgun evidence.

POSITION OF THE PARTIES:

[22] Mr. Driedger argues that the judges in the courts below erred in failing to exclude the evidence under s. 24(2) of the *Charter*. The trial court judge erred by holding that Mr. Driedger had consented to the search and the summary conviction appeal judge failed to correctly apply the *Grant* framework.

[23] The respondent Crown submits that leave should not be granted and the appeal should be dismissed. Granting leave under s. 839(1)(b) of the *Code* should be the exception rather than the norm and only on a question of law alone. The only issue on appeal now is the application of s. 24(2) of the *Charter*. An appellate finding on the application of the *Grant* framework will have little significance to the administration of criminal justice.

[24] Mr. Driedger suffered no deprivation of liberty as a result of his conviction. The merits of his appeal are weak.

[25] The Crown argues that the summary conviction appeal judge properly undertook a fresh s. 24(2) *Charter* analysis and that he did so correctly.

[26] In order to be granted leave to appeal Mr. Driedger must show that the summary conviction appeal judge made an error of law. He submits that the appeal judge erred in minimizing the seriousness of the breach based on the availability of regulatory powers. It is the non-criminal nature of these regulatory powers that ensures their legality.

[27] Mr. Driedger submits that in these circumstances neither officer had the legal authority to ask Mr. Driedger to produce his firearm, much less to enter his vehicle and take it.

[28] It was an error for the judge to rely on a regulatory power that cannot be used for criminal law purposes to diminish the seriousness of the *Charter*-infringing conduct.

[29] Further, the judge misunderstood the powers afforded to C.O. Piwek under ss. 136 and 142 of the *Act*. Those powers are only triggered for purposes related to the *Act*.

[30] There were no grounds to believe that Mr. Driedger had contravened the *Act*. Mr. Driedger said he was returning from work, not hunting.

[31] Finally, with respect to the improper storage conviction, the *Act* does not allow an officer to request production of ammunition and gun cases.

[32] Mr. Driedger submits that the judge should have considered the actions of C.O. Piwek and Cst. Kidd together. They set up a roadblock together. Cst. Kidd watched as C.O. Piwek performed a search that would have been clearly impermissible in the criminal context.

[33] Both officers failed to have regard for Mr. Driedger's privacy rights.

[34] This Court, says Mr. Driedger, must send a clear message that it is unacceptable to piggyback on regulatory statutes in order to obtain evidence for criminal prosecution.

[35] The Crown argues that the judge properly held the infringing conduct to be a minor *Charter* breach.

[36] Both officers were responsible for enforcing s. 14 of the *Act*, which precludes the carrying of loaded firearms in vehicles.

[37] Under the *Act*, Mr. Driedger was legally required to give C.O. Piwek the gun case upon request, so when C.O. Piwek opened the door himself instead of requesting the driver to do so, he committed a technical non-serious breach.

[38] C.O. Piwek believed the weapon fell within the RCMP mandate so he called it to Cst. Kidd's attention. There was no evidence that Cst. Kidd directed C.O. Piwek or otherwise used him for the purpose of a criminal investigation.

[39] In any event, Cst. Kidd had the same authority under the *Act* as C.O. Piwek.

[40] The evidence is not inadmissible merely because it was discovered in the course of an investigation under the *Act* rather than under the *Code*.

[41] The Crown also notes that the *Act* required Mr. Driedger to produce "any other thing" related to the *Act* upon request. The Crown argues that the presence of the ammunition and gun case had no relevance to the charges.

ANALYSIS:

[42] The summary conviction appeal judge correctly found that the search of Mr. Driedger's vehicle was unlawful. There was no consent and Mr. Driedger's *Charter* rights under s. 8 were breached.

[43] That being said, I find that Justice Veale did err in minimizing the seriousness of the breach based on the availability of regulatory powers. In particular, s. 142 of the *Act* deals with warrantless searches. It says the following:

> 142(1) A conservation officer may exercise the powers of search and seizure described in subsection 141(1) without a warrant if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be feasible to obtain a warrant.

[44] This is a case where there were no exigent circumstances and, therefore, this section cannot be relied upon to reduce the seriousness of the *Charter*-infringing conduct.

[45] For this reason, I am prepared to grant leave and conduct an appellate review of Justice Veale's analysis under s. 24(2) of the *Charter*.

THE ISSUE TO BE DECIDED:

[46] Should the evidence obtained by C.O. Piwek and Cst. Kidd unlawfully be excluded under s. 24(2) of the *Charter*?

THE *GRANT* TEST FOR EXCLUSION:

[47] Under the Supreme Court of Canada's decision in *Grant* the Courts are to inquire into (at para. 71):

> (a) the seriousness of the *Charter*-infringing state conduct;
>
> (b) the impact of the breach on the *Charter*-protected interests of the accused; and
>
> (c) society's interest in the adjudication of the case on its merits.

[48] In balancing these factors, courts are to be concerned with the long-term interests of the administration of justice and are not to be deafened by short-term public clamour (at para. 84).

[49] The determinations are to be made by applying the principles to all of the circumstances on a case-specific basis (at para. 71).

(a) Seriousness of the *Charter*-infringing conduct:

[50] The more severe the state conduct, the more likely exclusion will occur (*Grant* at para. 72).

[51] This is a case where the RCMP set up a compliance roadblock on the Alaska Highway between Johnson Crossing and Teslin. They requested the presence of a conservation officer under the *Act*. The reason given by C.O. Piwek was that it was

the time of year when hunters would be on the road and it would give him an opportunity to “check” hunters from other parts of the region and to provide assistance to them with wildlife matters.

[52] Mr. Driedger was stopped and C.O. Piwek asked if he had any firearms in the vehicle. The conservation officer was acting pursuant to his authority under s. 136(1) of the *Act*. Mr. Driedger told C.O. Piwek that he had no firearms in the vehicle but he did have them in the trailer that he was pulling behind his truck.

[53] C.O. Piwek saw what looked like a gun case in the back seat of Mr. Driedger’s truck in plain view. He asked Mr. Driedger to open the door so that he could check what was in the gun case. He was concerned that Mr. Driedger was in contravention of s. 14(1) of the *Act,* which states:

> A person shall not carry a loaded firearm in or on a vehicle.

[54] There are, of course, many valid reasons for not carrying a loaded firearm in a vehicle.

[55] During this time Cst. Kidd was present at the scene. According to s. 128(1) of the *Act*, “a member of the Royal Canadian Mounted Police is a conservation officer for the purposes of this Act.”

[56] Cst. Kidd arrested Mr. Driedger, who was later charged and released at the roadside.

[57] A key factor to be considered in any s. 24(2) *Charter* analysis is the state of mind of the peace officers. In this case, both officers believed that they were acting appropriately.

[58] I find that both officers were acting in good faith, believing that they had the right to seize the weapon under both the *Act* and the *Code*. They did not exhibit a wilful or reckless disregard of Mr. Driedger’s *Charter* rights.

[59] Based on what he saw in the back seat of the vehicle, C.O. Piwek was understandably concerned when Mr. Driedger said there were no firearms inside the truck.

[60] By reaching in the truck himself to remove and investigate the contents of the gun case, C. O. Piwek violated Mr. Driedger's rights under s. 8 of the *Charter*.

[61] This is not like the case of *R. v. Colarusso* [1994] 1 S.C.R. 20, 110 D.L.R. (4th) 297, where blood and urine samples were taken for medical purposes and seized by the coroner, who then turned them over to the police for analysis.

[62] This is a case where both officers were present at the roadside during a compliance check set up by them. It was hunting season in the Yukon and the decision to work together was a legitimate one under the circumstances.

[63] The violation in this case involves a very brief period of time when Mr. Driedger's privacy rights were breached by the conservation officer reaching inside the appellant's vehicle to investigate an item that was in plain view.

[64] It is true that Mr. Driedger did not consent to the search of his vehicle and the seizure of the contents of the gun case breached his right to be free from unreasonable search and seizure.

[65] That being said, the search was not carried out in an invasive or particularly intrusive way. C.O. Piwek's actions amounted to a very brief search of a concerning and suspicious item located in plain view inside Mr. Driedger's vehicle.

[66] Mr. Driedger's privacy rights were already somewhat reduced by the fact that he was in his vehicle, which he knew could be stopped at any time for a number of reasonable and valid reasons, including a roadside compliance check.

[67] Balancing the effects of inclusion against exclusion, bearing in mind the long-term effects on the administration of justice, I find that the officer's actions did not amount to a pattern of abuse tending to support exclusion in this case.

[68] I find that, in this case, the seriousness of the infringing conduct does not demand exclusion of the gun evidence.

(b) Impact of the breach on the accused's *Charter* rights:

[69] Mr. Driedger had the right to be free from unreasonable search and seizure but this is a case where the breach was not protracted.

[70] It was a brief intrusion on Mr. Driedger's privacy rights inside his vehicle. The intrusion resulted in a criminal conviction for possession of a restricted firearm in an unauthorized place and unsafe storage and consequently a fine was imposed.

[71] Mr. Driedger was not detained for an extensive period of time and was released at the roadside after being charged.

[72] The vehicle was not searched beyond the removal of an apparent gun case, which was in plain sight in the back seat.

[73] Mr. Driedger's personal integrity was not impacted by the breach. His person was not searched and he was not subject to extensive questioning at the roadside.

[74] I find that, under s. 24(2) of the *Charter*, the minimal impact of the breach on the accused's *Charte*r rights favours admission of the evidence obtained.

(c) Society's interest in the adjudication of the case on its merits:

[75] Paragraph 81 of *Grant* indicates that the reliability of the evidence is an important factor to consider. The more relevant and reliable the evidence is, the more likely its admission is to be supported.

[76] This case involves real evidence. It involves the seizure of a restricted weapon and evidence of improper storage of that weapon.

[77] The admission of the evidence is crucial to the prosecution's case. Without the evidence, there is no case for the Crown.

[78] It is a serious offence to carry a restricted weapon in a vehicle in an unsafe manner. Society as a whole has a strong interest in protecting the public from such actions.

[79] The general public has a strong interest in making sure that those who carry weapons inside their vehicles comply fully with the laws under both the *Act* and the *Code*. Safe storage is an important consideration in any offence involving the use of firearms.

[80] I find that society would want this matter to be adjudicated on its merits and, therefore, the evidence in this case should be admitted.

[81] For all of the reasons given, I would grant leave but dismiss the appeal.

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The Honourable Madam Justice Tulloch

I agree:

_____
The Honourable Chief Justice Bauman

I agree:

_____
The Honourable Mr. Justice Donald