

Citation: *R. v. Beattie* , 2006 YKTC 86

Date: 20060908
Docket: T.C. 06-00030
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Foisy

REGINA

v.

ALBERT WILLIAM BEATTIE

Appearances:
David McWhinnie
Emily Hill

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] FOISY T.C.J. (Oral): Firstly, let me say that Constable Ristau gave his evidence in a candid straightforward manner. I am sure that he was telling us everything he remembered and was trying his best to tell the truth. I have no doubt about that.

[2] However, when it comes to the arrest, the four reasons which were given were that bars generally have washrooms where drug deals are done, but not that specific washroom, that there were two men in the washroom and that is somewhat unusual, the way the money was packaged, and a tip from an anonymous person, who had not been

known to give either good or bad advice before. I think individually or collectively is not sufficient to go on beyond a suspicion, be it a fairly strong suspicion. I think constable honestly said that is what he had, "is that I was suspicious." That does not translate into, in this case, into reasonable and probable grounds, and so the arrest would be unlawful here.

[3] On the s. 8 argument, I think, in this particular case, the officer should have advised the individuals, because subjectively he thought that there may be some security, some safety issue here, but there was really nothing else to support that thought. One person has a cell phone and puts it in his pocket. They are asked what they are doing in there. One individual says, "Well, trying to phone somebody because we can't in the bar, it is too noisy." That was confirmed by the evidence of the constable and seemed to be a reasonable reply.

[4] Having gone that far, I think, then, if he wanted to search the pockets of the individuals, he should have advised them that they need not comply. They could leave if they wanted to, or he could have simply said, "I want to see your hands here at all times, don't you dare put your hands in your pockets." That means that the wad of money, which I think was perhaps the most important part of what he found or what was produced, would not be properly before me under a s. 8 challenge.

[5] Under these circumstances, the search was unreasonable. So I suspect that, subject to what counsel may want to say, that there is a s. 24 remedy available here. It seems that without the money, certainly on what I have heard, there is no case, unless

there is more to come. In any event, on the unlawful arrest, I think that I would not have admitted whatever was found later, after the arrest was made.

[6] MR. MCWHINNIE: Well, Your Honour, the only authority that I am aware of to support the search that led to various things that might form the substance of charges before you would be incidental to the arrest. If the arrest is unlawful, the case law is crystal clear that, barring usual circumstances, which I am not in a position to advance, the evidence would be presumptively inadmissible. So I am going to close my case at this point, call no evidence.

[7] THE COURT: So what we will do, then, is I presume the evidence on the *voir dire* will be admitted as part of the trial.

[8] MR. MCWHINNIE: I would ask for that.

[9] THE COURT: Based on your remarks --

[10] MR. MCWHINNIE: I'd be inviting you to dismiss.

[11] THE COURT: -- I would dismiss. I will dismiss.

[12] MR. MCWHINNIE: Thank you, Your Honour.

[13] THE COURT: It follows that Count 3 then would be dismissed as well?

[14] MR. MCWHINNIE: Yes.

[15] THE COURT: All right.

FOISY T.C.J.