Citation: *R. v. Davidson*, 2019 YKTC 16

Date: 20190326
Docket: 17-00345
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

ROBERT JAMES DAVIDSON

Appearances:
Leo Lane — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

REASONS FOR JUDGMENT AND RULING ON *CHARTER* APPLICATION

[1] Ruddy J. (Oral): Robert Davidson has been charged with operating a motor vehicle while his ability to do so was impaired by alcohol and with refusing to provide a breath sample.

Facts

[2] By and large, the facts are not in dispute.

[3] On August 1, 2017, between 5:00 and 5:30 a.m., Brett Ritchie was outside the Best Value Inn in Whitehorse, packing for the next leg of his Yukon trip when a truck pulled up. He describes the driver as in his fifties, balding, Caucasian and around 5'8" tall. Mr. Ritchie thought the driver introduced himself as "Ronnie", but says it could have

been “Robbie”. The two spoke for 20-30 minutes. Mr. Ritchie believed the individual to be intoxicated based on the fact his speech was slurred, and he did not finish his sentences.

[4] When the driver said he was going to drive home, Mr. Ritchie, and his travelling companion who had since joined him outside, cautioned the driver not to drive, and said they would call the police if he did so. The driver seemed to agree, and even held out his keys, only to snatch them back. When the driver became hostile, Mr. Ritchie and his friend decided to back off.

[5] The driver then left in his vehicle. Mr. Ritchie observed the driving for five to ten seconds and noted that the driver ran over the curb by the stop sign, swerved all over the road, and crossed over the line.

[6] Mr. Ritchie contacted the police to report an impaired driver, and provided the license plate of the vehicle, one registered to Mr. Davidson.

[7] Csts. Caron and McEachen were dispatched shortly thereafter at 6:00 a.m. The officers drove to an address in the industrial area that was associated with the vehicle registration, but the vehicle was not there. On the way back, the officers located the vehicle parked in a gravel area near the Weenie Wagon also in the industrial area of Whitehorse at 6:17 a.m. Both doors were open and Mr. Davidson was standing outside the passenger door, rummaging in the vehicle. The vehicle was not running, and the keys were not in the ignition. There were no other vehicles or people in the area.

[8] Both officers had some interaction with Mr. Davidson. Cst. MacEachen, who was acting as field coach to Cst. Caron who had become an RCMP member in June 2017, says that Mr. Davidson was unsteady on his feet, slurred his speech and had a strong odour of liquor on his breath.

[9] Cst. Caron says that Mr. Davidson had slurred speech and smelled of alcohol. He says that Mr. Davidson had problems with balance, noting that Mr. Davidson walked from the passenger side by "helping himself with the vehicle".

[10] Evidently, Mr. Davidson insisted that the vehicle had been parked there for three hours. Cst. Caron says that he touched the front and rear wheels on the driver's side of the vehicle in the lug nut area and noted them to be warm to the touch, which indicated to him that the vehicle had been recently driven.

[11] Cst. Caron formed the opinion that Mr. Davidson had operated a motor vehicle while his ability to do so was impaired by alcohol, articulating his grounds as follows:

- Based on touching the wheels and the call from dispatch, he believed the vehicle had been recently driven;
- Mr. Davidson was the only person near the vehicle;
- Mr. Davidson was the registered owner of the vehicle;
- A call had been received with a description of the vehicle and licence plate indicating that it was being operated by a person impaired by alcohol; and
- Mr. Davidson had slurred speech, poor balance, and an odour of liquor on his breath.

[12] Cst. Caron arrested Mr. Davidson for impaired driving and made a demand for a breath sample. Mr. Davidson was transported to the RCMP detachment. Ultimately, Mr. Davidson refused to provide a sample, insisting that he had not been driving.

[13] Cst. Caron transported Mr. Davidson to the Arrest Processing Unit ("APU") where he was booked in at 8:05 a.m. He was released at 5:12 p.m.

Issues

[14] Counsel for Mr. Davidson filed a notice of *Charter* application alleging breaches contrary to ss. 7, 9 and 10(b) and seeking relief pursuant to both ss. 24(1) and 24(2). While the notice sets out six separate *Charter* related issues, defence counsel is now advancing arguments on only three issues:

1. Did the arresting officer have reasonable grounds to make the breath demand?

2. Does Mr. Davidson's detention at the APU following the investigation amount to an arbitrary detention contrary to s. 9 of the *Charter*, and, if so, should the evidence of Mr. Davidson's refusal be ruled inadmissible pursuant to s. 24(2)? and

3. Is there sufficient evidence to establish, beyond a reasonable doubt, that Mr. Davidson operated a motor vehicle while his ability to do so was impaired by alcohol?

Reasonable Grounds

[15] With respect to the first issue, defence counsel argues that Cst. Caron had no reasonable grounds to arrest thus invalidating the demand for a breath sample. The law is well settled that an officer's grounds must be both subjectively held and objectively reasonable. There is no suggestion that Cst. Caron's grounds were not

subjectively held, but defence counsel submits that the grounds do not withstand objective scrutiny.

[16] Specifically, counsel suggests that the information was insufficient to conclude that Mr. Davidson had operated the vehicle. In addition, counsel says that the observations regarding indicia of impairment are objectively unreliable as the officer observes only one issue of balance, there are no issues with balance observable on the VICS video, the officer is unable to articulate specific words that were slurred, and the officer would have been approximately one metre away from Mr. Davidson in circumstances that would have made it difficult to notice the smell of alcohol. Finally, counsel notes that the fact that Cst. Caron forms his opinion and arrests Mr. Davidson in under two minutes adds to the unreliability of his observations when considered in light of his relative inexperience, having become a member of the RCMP no more than two months prior to the offence date.

[17] With respect to the reasonableness of Cst. Caron's belief that Mr. Davidson had operated a motor vehicle, I am satisfied that the officer's belief was objectively reasonable for the following reasons:

1. A mere 17 minutes had passed since the call reporting that the very same vehicle was being operated by a suspected impaired driver;
2. The wheels were still warm suggesting the vehicle had recently been operated;
3. Mr. Davidson was the registered owner of the vehicle; and
4. There was no one else in the vicinity.

[18] In such circumstances, it is entirely reasonable for Cst. Caron to conclude that Mr. Davidson had operated the motor vehicle.

[19] With respect to Cst. Caron's evidence regarding indicia of impairment, I am not persuaded that his observations can be said to be unreliable. Firstly, his evidence in relation to odour of liquor, slurred speech and uncertain balance were corroborated by Cst. MacEachen.

[20] Secondly, while Cst. Caron was unable to articulate specific words uttered by Mr. Davidson which he considered to be slurred, it must be noted that the VICS video of Mr. Davidson once he had been placed in the police vehicle immediately following his arrest shows notably slurred speech. While the video is taken after the grounds were formed, it was nonetheless proximate in time and offers a clear indication of Mr. Davidson's condition at the time of his arrest. I agree with the submission of the Crown, that the video corroborates the evidence of both officers with respect to slurred speech.

[21] With respect to the speed with which Cst. Caron formed his grounds in light of his relative inexperience, the question of whether sufficient investigation has been undertaken before an officer forms his or her grounds is dependent on the circumstances of any given case. As noted in the decision of the Ontario Court of Appeal in *R. v. Bush,* 2010 ONCA 554, at para. 70, there is no minimum time period required before an officer can be said to have objectively reasonable grounds:

> The issue is not whether the officer could have conducted a more thorough investigation. The issue is whether, when the officer made the breath demand, he subjectively and objectively had reasonable and probable grounds to do so. That the belief was formed in less than one minute is not determinative. That an opinion of impairment of the ability to

> operate a motor vehicle can be made in under a minute is neither surprising nor unusual.

[22] While one would expect an experienced officer to be better equipped to form an objectively reasonable opinion in a shorter time frame than a newly minted officer, that is not to say that a relatively inexperienced officer cannot reasonably form his or her opinion quickly in appropriate circumstances. This would include circumstances where the indicia of impairment are pronounced, and where there are no other obvious explanations for the observations such as an accident resulting in a possible head injury as was the case in the *R. v. Pye,* 2017 YKTC 57, decision referenced by defence counsel.

[23] In this case, the circumstances do not suggest any alternate explanations for the indicia of impairment noted, which should have given rise to more investigation before Cst. Caron formed his opinion. Furthermore, I am satisfied that the indicia of impairment were sufficiently obvious to enable even a junior officer to form objectively reasonable grounds even in such a short period. Indeed, I would say that anyone, including a layperson, viewing Mr. Davidson's demeanour on the video taken shortly after his arrest would conclude that it is immediately and readily apparent that he is intoxicated.

[24] In all of circumstances, I am satisfied that Cst. Caron had reasonable grounds to arrest Mr. Davidson, and to make the demand that he provide samples of his breath.

Overholding

[25] Following his arrest, Mr. Davidson was held in custody for approximately 11 hours, with roughly nine of those spent at the APU.

[26] Defence counsel argues that Mr. Davidson's prolonged detention at the APU was not justified under s. 498(1.1) of the *Criminal Code* and therefore amounts to an arbitrary detention in breach of s. 9 of the *Charter*. She relies on the Ontario Court of Appeal decision in *R. v. Pino,* 2016 ONCA 389, in advancing the argument that the appropriate remedy would be the exclusion of the evidence with respect to Mr. Davidson's refusal to provide a breath sample pursuant to s. 24(2) of the *Charter*.

[27] Crown argues that the defence has not established a breach of s. 9. In the alternative, Crown argues that there is an insufficient nexus between the breach and the evidence of refusal to warrant exclusion.

[28] Both counsel are agreed, as am I, that this would not be the clearest of cases justifying a judicial stay pursuant to s. 24(1) of the *Charter*.

[29] To resolve the issue of overholding, two questions must be answered:

1. In the circumstances of this case, does the continued detention of Mr. Davidson amount to an arbitrary detention contrary to s. 9 of the *Charter*; and
2. If so, is exclusion of the evidence relating to Mr. Davidson's refusal to provide a breath sample an available and appropriate remedy?

1. Section 9

[30] With respect to the first question, s. 498 of the *Criminal Code* requires that a person arrested without warrant and taken into custody be released "as soon as practicable" subject to s. 498(1.1) which reads:

> (1.1) The officer in charge or the peace officer shall not release a person under subsection (1) if the officer in charge or peace officer believes, on reasonable grounds,
>
> > (a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to
> >
> > > (i) establish the identity of the person,
> >
> > > (ii) secure or preserve evidence of or relating to the offence,
> >
> > > (iii) prevent the continuation or repetition of the offence or the commission of another offence, or
> >
> > > (iv) ensure the safety and security of any victim of or witness to the offence; or
> >
> > (b) that, if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

[31] There are numerous cases that have held that a detention that does not accord with one of the exceptions set out in s. 498(1.1) is an arbitrary detention. A determination of whether the detention in this case amounts to an arbitrary detention is a question of fact.

[32] The evidence in relation to the continuing detention of Mr. Davidson was provided by both Cst. Caron and by former Corrections Officer ("CO"), Kory O'Neill.

[33] Cst. Caron said that Mr. Davidson was insistent that he would be going to work that day at Great West Glass. Cst. Caron assumed that the employment would require him to move vehicles. He noted the proximity of the Salvation Army to Great West Glass, and the number of people that would be in the area. He had noted no reduction in Mr. Davidson's significant level of intoxication in the two hours he had been dealing with him, and felt that it would be safer to wait until Mr. Davidson was no longer intoxicated before releasing him. He did not ask Mr. Davidson if there was anyone sober who could pick him up.

[34] Cst. Caron lodged Mr. Davidson at the APU at 8:05 a.m.

[35] Cst. Caron was aware that Whitehorse Correctional Centre ("WCC") could not release Mr. Davidson, as the intention was for him to be released on a Promise to Appear. Cst. Caron says he had no idea how long Mr. Davidson would be held at the APU, but indicated that, generally, the Watch Commander would attend to see if prisoners are ready to be released. There was no evidence before me of what role, if any, the Watch Commander may have played in relation to Mr. Davidson.

[36] Cst. Caron did not check on Mr. Davidson's state of intoxication at any time before attending at WCC at 5:12 p.m. to release him. He says that while there is no policy per se, individuals cannot be held for more than 12 hours. It is his understanding that if it is approaching 12 hours, WCC would contact the Watch Commander.

[37] Mr. O'Neill testified that he was a CO at WCC and was working in the APU on August 1, 2017. He says that when the detainee status is "PTA", or promise to appear, the COs cannot release. It is up to the RCMP to determine when individuals will be released as there is documentation to sign. When the detainee status is "RWS", or release when sober, release is at the discretion of the CO. He says that COs can hold prisoners up to 12 hours. If they are sober before the 12 hours, they would be released as long as the CO felt that there was no safety risk. Prisoners are checked every 15 minutes with notations made in a running log. He says it was not the practice of COs to contact the RCMP to advise if a prisoner on a PTA status is sober. Nor, in his experience, do the RCMP call to check on status.

[38] With respect to Mr. Davidson on August 1, 2017, Mr. O'Neill says that he has only a vague recollection of him with few specifics. He does remember that Mr. Davidson repeatedly asked why he was being held and when he could leave. Mr. O'Neill describes Mr. Davidson as intoxicated and agitated. He says that Mr. Davidson kept yelling and kicking the door. Mr. O'Neill said that Mr. Davidson's "reasoning was off" noting that he would repeatedly ask questions and then ask the very same questions again moments later.

[39] Mr. O'Neill indicated that his shift in the APU ran from 10:00 a.m. to 4:00 p.m. He was not present when Mr. Davidson was released. He believes that Mr. Davidson's level of intoxication slowly came down over that time.

[40] In considering the evidence, I conclude that Mr. Davidson's initial detention was justified under s. 498(1.1). Cst. Caron's consideration of Mr. Davidson's level of

intoxication, his stated intention to go to work, and the risks that would present in a busy area of downtown on a weekday should Mr. Davidson get behind the wheel of another vehicle, satisfy me that Cst. Caron had reasonable grounds, at the time he lodged Mr. Davidson at the APU, to believe that detention was necessary to prevent the repetition of the offence or the commission of another offence.

[41] However, the problem in this case does not lay with the initial decision to detain. Rather it lays with what appears to be a broader systemic problem in the relation to the loose policies that govern the detention and release of detainees at the APU.

[42] It is clear on the evidence of both Cst. Caron and Mr. O'Neill that when a person is lodged at the APU on PTA status, COs do check on them regularly, but it is only the RCMP who can release. There does not seem to be any system of regular communication between the COs at the APU and the RCMP in relation to the status of a detainee which would ensure consistent monitoring of a detainee's condition to ensure that they are not held in custody any longer than necessary.

[43] Even more troubling, both Cst. Caron and Mr. O'Neill referenced rough guidelines of holding individuals detained due to their state of intoxication for up to 12 hours. Indeed, Cst. Caron noted that the only apparent communication between the APU and the RCMP in relation to a PTA hold is if detention is getting close to 12 hours, at which point the CO will contact the Watch Commander to advise. This suggests a belief that any person detained as a result of their state of intoxication can be held up to 12 hours as of right regardless of the individual's state of intoxication at any given time.

[44] It must be remembered that a deprivation of liberty is taken very seriously in our justice system. An unjustified deprivation of liberty is a breach of s. 9 of the *Charter*. The exceptions in s. 498 do allow for detention, but not unlimited detention. The continuing authority to detain under s. 498 lasts only so long as the circumstances that give rise to the reasonable grounds to detain continue to exist. Once they no longer exist, the person must be released as soon as practicable. Release is not a question of convenience for the RCMP or of compliance with a 12-hour hold policy. It is a question of whether there are continuing grounds to detain.

[45] In this case, it is difficult to determine what Mr. Davidson's level of intoxication was at any given time over the course of his detention, as Mr. O'Neill has only a vague recollection. What is clear, however, is that there were no efforts made by Cst. Caron or another peace officer to assess Mr. Davidson's state of intoxication on an ongoing basis. Rather the timing of Mr. Davidson's release was dictated by the convenience of the RCMP within this rough guideline of 12 hours.

[46] In my view, the failure to actively monitor Mr. Davidson's detention, against the authority set out in s. 498(1.1), to ensure his detention was no longer than necessary means that what began as an authorized detention became, at a point that the evidence does not fully make clear, an arbitrary detention. Accordingly, I am satisfied that the defence has established, on a balance of probabilities, that there was a breach of s. 9 of the *Charter*.

2. Section 24(2):

[47] Having found a breach of s. 9, the next question is the appropriate remedy. As noted, defence counsel seeks exclusion of the evidence of Mr. Davidson's refusal pursuant to s. 24(2) of the *Charter*. The issue at dispute, in this case, is whether the evidence of the refusal can be said to have been "obtained in a manner that infringed or denied any right", as required by s. 24(2), particularly as the evidence of refusal preceded the breach of s. 9.

[48] In *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40, the Supreme Court of Canada reinforced that it is the whole of the relationship between the evidence obtained and the *Charter* breach that must be examined in determining whether a sufficient connection exists to warrant exclusion:

> Although *Therens* and *Strachan* warned against over-reliance on causation and advocated an examination of the entire relationship between the *Charter* breach and the impugned evidence, causation was not entirely discarded. Accordingly, while a temporal link will often suffice, it is not always determinative. It will not be determinative if the connection between the securing of the evidence and the breach is remote. I take remote to mean that the connection is tenuous. The concept of remoteness relates not only to the temporal connection but to the causal connection as well. It follows that the mere presence of a temporal link is not necessarily sufficient. In obedience to the instruction that the whole of the relationship between the breach and the evidence be examined, it is appropriate for the court to consider the strength of the causal relationship. If both the temporal connection and the causal connection are tenuous, the court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the *Charter*. On the other hand, the temporal connection may be so strong that the *Charter* breach is an integral part of a single transaction. In that case, a causal connection that is weak or even absent will be of no importance. Once the principles of law are defined, the strength of the connection between the evidence obtained and the *Charter* breach is a question of fact. Accordingly, the applicability of s. 24(2) will be decided on a case-by-case basis as suggested by Dickson C.J. in *Strachan*.

[49] In *Pino*, the Ontario Court of Appeal noted that the Supreme Court of Canada is silent on the question of exclusion of evidence discovered before a *Charter* breach has occurred. In finding in favour of retrospective exclusion, Laskin J.A. sets out the following analytical framework at para. 72:

> Based on the case law, the following considerations should guide a court's approach to the "obtained in a manner" requirement in s. 24(2):
>
> - The approach should be generous, consistent with the purpose of s. 24(2);
> - The court should consider the entire "chain of events" between the accused and the police;
> - The requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct;
> - The connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections;
> - But the connection cannot be either too tenuous or too remote.

[50] The reasoning in *Pino* is certainly compelling when considered in light of the particular facts of the case itself, including an armed and masked takedown by police, which occurred before the discovery of marijuana in the trunk of Ms. Pino's vehicle, followed by a failure to properly inform the accused of the right to counsel, and detention of the accused for five and one-half hours with a deliberate denial of access to counsel, both of which occurred after the discovery of the marijuana. The arresting officers were also found to have lied to the Court.

[51] Noting that there would be no question the "obtained in a manner" requirement would have been met if the two s. 10(b) breaches had crystallized before the vehicle search, Laskin J., at para. 77, asks:

> So, should it make a difference whether the s. 10(b) breaches occurred before or after the discovery of evidence? I do not think so. In either case, the administration of justice could be brought into disrepute if the court condoned the serious *Charter* violations.

[52] I am prepared to accept, based on the reasoning in the *Pino* decision, that exclusion of evidence discovered before a *Charter* breach can be a retrospective remedy in appropriate circumstances. However, it is clear that the assessment of whether there is a sufficient link between the discovery of the evidence and the *Charter* breach to meet the "obtained in a manner" requirement for exclusion under s. 24(2) will be specific to the particular facts of any given case, and it must be noted that the facts in this case differ significantly from those in *Pino*. This case does not involve the same multiplicity of breaches nor the clear *mala fides* on the part of the police officers.

[53] Defence counsel has filed three decisions out of the Ontario Court of Justice, in support of her argument for exclusion, which are more factually similar to the case at bar: *R. v. Rahman*, 2016 ONCJ 718, *R. v. Lorenzo*, 2016 ONCJ 634 and *R. v. Turcotte,* 2017 ONCJ 716.

[54] In *Rahman*, the accused came to the attention of the police following an accident. After breath samples of 148 and 154 milligrams in 100 millilitres of blood were provided, the officer in charge made the decision that the accused be held. Mr. Rahman was released seven hours later. In concluding that a breach of s. 9 had occurred, Blouin J.

noted that the officer made no personal assessment of the accused's condition before deciding to detain him, and made no ongoing assessment of Mr. Rahman's condition over the course of his detention. In applying the approach set out in *Pino*, at para. 25, Blouin J. concludes:

> In my view, the overhold was part of the same chain of events or course of conduct. It would be difficult to conclude otherwise since the detention is temporally connected to the breath sample investigation, and the reasons for overholding are directly connected to the investigation regarding impairment (and to some degree the readings themselves).

[55] The breath readings were excluded pursuant to s. 24(2).

[56] In *Lorenzo*, the accused was stopped for a sobriety check which led to a roadside demand. Following the failed roadside test, Ms. Lorenzo was taken to the police station to provide further samples of her breath with readings of 145 and 135 milligrams in 100 millilitres of blood. Once completed, the officer in charge made the decision to detain the accused. She was released six hours later. Hawke J. found that neither officer in charge who dealt with Ms. Lorenzo had the requisite grounds to detain her, noting their assessment to be no more than lip-service to the requirements of s. 498, resulting in an arbitrary detention. In applying *Pino*, Hawke J. held that the continuous detention, from roadside test to release, was temporally and contextually connected to the breath sample evidence, which was consequently excluded.

[57] In *Turcotte*, the accused failed a roadside test and ultimately provided breath samples with readings of 140 and 130 milligrams in 100 millilitres of blood. Mr. Turcotte was held for six hours. No evidence was led with respect to the reasons for the

detention. McInnes J., too, applied *Pino*, and quoting extensively from the *Lorenzo* decision, found a breach of s. 9 and excluded the evidence of the breath readings.

[58] It is notable that in each of these three cases, either no evidence was led to justify the detention pursuant to s. 498(1.1) or it was held that the requisite grounds for detention did not exist. Accordingly, the s. 9 breach in each case crystallized immediately following the impaired investigation when the decision was made to detain. This is in contrast to the case before me, in which, as I have already concluded, the initial detention was justified under s. 498(1.1). If, as was found in these three cases, a temporal and contextual connection can be said to exist between the fruits of an impaired investigation and an unjustified overhold, it is certainly arguable that any temporal connection would be tenuous, at best, in circumstances where the initial detention is justified.

[59] *R. v. Dos Santos*, 2019 ONCJ 126, also out of the Ontario Court of Justice, has facts that are similar in this regard. In *Dos Santos*, the accused was stopped for speeding. Following a failed roadside test, Mr. Dos Santos was arrested and taken for breath testing registering at 200 and 190 milligrams in 100 millilitres of blood. The officer in charge assessed Mr. Dos Santos and determined that he could not be released due to his level of intoxication. He was transported and lodged in a cell for six hours. For the last five and one-half hours, Green J. was satisfied that no efforts were made to assess Mr. Dos Santos condition, noting, at paras. 18-19, the following:

> 18 As I understand the law, having made the decision to hold Mr. Dos Santos in custody for his own safety, the police were required to assess him at reasonable intervals so that he could be released as soon as practicable - that is within a reasonable time of the safety concerns

> related to his level of intoxication abating (*R. v. Iseler*, [2004] O.J. No. 4332 (CA). In *R. v. Iseler*, the Court of Appeal stated that it was inexcusable that the police failed to monitor Mr. Iseler at all during the 11 hours that he was in custody (*R. v. Iseler*, *supra* at paragraph 31). In light of the complete absence of any assessment or monitoring of Mr. Dos Santos after 4:15 a.m., I am satisfied that Mr. Dos Santos has met his burden and established an arbitrary detention for a portion of the time that he was detained at 14 division. I appreciate that in the case at bar, Mr. Dos Santos was only at 14 division for approximately six hours and had not been monitored for only 5 $^{1}/_{2}$ hours. I also appreciate that the police do not have to release a detainee at the exact moment that the detainee becomes sober enough to travel home on his/her own. While this may reduce the seriousness of the *Charter* breach and the impact that breach had on Mr. Dos Santos, it does not make the detention lawful. A lot can change in five hours. The police were required to monitor Mr. Dos Santos at regular intervals so that he could be released as soon as practicable. This was not done in the case at bar.
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> 19 While I have found a section 9 breach, in my view this is a relatively minor breach that would not have resulted in a remedy under either section 24(1) or 24(2) of the *Charter*.

[60] While the s. 9 breach is arguably more serious in this case as Mr. Davidson was held for considerably longer, the *Dos Santos* case does raise questions about whether a s. 9 breach following an initially justified detention would be viewed in the same way as a breach which commences immediately after completion of the impaired investigation.

[61] Furthermore, it would appear that the law, even in Ontario, on the issue of the availability of s. 24(2) exclusion remedy for a s. 9 overhold breach in an impaired driving case, is far from settled.

[62] In *R. v. Larocque*, 2018 ONSC 6475, an appeal to the Ontario Superior Court of Justice, the appellant was stopped for travelling below the speed limit and demonstrating difficulties turning his vehicle. The appellant registered a fail on a roadside screening device, and ultimately provided samples of breath registering at 223

and 214 milligrams in 100 millilitres of blood. Mr. Larocque was lodged in cells until sober and not released until seven and one-half hours later. Kurke J. held that the trial judge erred in failing to find that the overhold amounted to a breach of s. 9 as no evidence was offered to justify the continued detention. With respect to the issue of whether a s. 24(2) remedy of exclusion was available, however, the Court considered the analysis in *Pino* (referred to as *Edwards* in the *Larocque* decision) and made the following comments at paras. 61-64:

> 61 But is *Edwards* even applicable to the context of this case, where a person who has been arrested for drinking and driving offences, and has provided breath samples analyzed at two and one half times the legal limit, is held in custody "pending sobriety" for a period of time?
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> 62 Prior to *Edwards*, the Ontario Court of Appeal focused on the lack of any temporal or causal connection between the breath evidence and the breach by overholding, in finding no scope for the operation of s. 24(2) of the *Charter*: *R. v. Sapusak*, [1998] O.J. No. 4148 (C.A.). In *Iseler*, where the relief sought was a stay of proceedings, the same Court, at para. 31, made findings consistent with s. 24(2) reasoning and inconsistent with *Edwards*:
>
> > While the police conduct in failing to monitor the accused was inexcusable, it is important to note that the breach of the appellant's s. 9 Charter rights occurred post-offence. The breach had nothing to do with the investigation and the gathering of evidence against him. It did not impact on trial fairness.
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> 63 Several cases have held that the breaches in *Edwards* were of a different kind than anything in drinking and driving cases like this one, and required a broader analysis that was not appropriate to the drinking and driving context: *R. v. Garrido-Hernandez*, 2017 ONSC 2552, at paras. 37-42; *R. v. Cheema*, 2018 ONSC 229, at paras. 60-68. On the reasoning of those authorities, the statements of the law in *Sapusak* and *Iseler*, which were not specifically overruled by *Edwards*, still bind this Court.
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> 64 Both lines of reasoning dictate the same result. Whether the analysis is causal, temporal or contextual, there is no genuine connection between the care or control, the breath samples that were obtained from the appellant and analyzed, and the breach that followed.

[63] Similarly, in *R. v. Cheema*, 2018 ONSC 229, on appeal to the Ontario Superior Court of Justice, the accused failed a roadside test, and after having provided breath samples in excess of the legal limit of 80 milligrams in 100 millilitres of blood, was held in custody for approximately four and one-half hours. On the question of whether the trial judge had erred in failing to exclude the breath test results pursuant to s. 24(2) in relation to the s. 9 overhold breach, Barnes J. notes, at para. 68, the similarity of the facts in *Cheema* to those in the *Iseler* decision and finds:

> The facts in *Pino* are vastly different from those in *Iseler*. The Court in *Pino* did not refer to its decision in *Iseler*. It did not overrule the decision in *Iseler*. The facts in *Iseler* are similar to the facts in this case. The facts in *Pino* are completely different. The trial judge was bound by the decision in *Iseler*. Based on *Iseler*, the trial judge was correct to conclude that there was no temporal or causal connection between the breach and the obtaining of the evidence and therefore s. 24(2) of the *Charter* does not apply.

[64] As each of these decisions out of the Ontario Superior Court of Justice post-date the three Ontario Court of Justice cases provided by the defence, it would seem that the prevailing view in Ontario, subject to any future rulings of the Ontario Court of Appeal, is that there is not a sufficient temporal, causal, or contextual connection between breath readings obtained and a subsequent overhold breach to meet the “obtained in a manner” requirement of s. 24(2).

[65] I would adopt the reasoning of the Ontario Superior Court of Justice in finding that a s. 24(2) remedy is not available. In the result, the evidence of Mr. Davidson’s refusal to provide breath samples pursuant to a lawful demand will not be excluded. The offence of refusal has been made out and a conviction will be entered.

[66] I would, however, invite counsel to make submissions on whether there is a potential remedy to be considered in the sentencing phase of these proceedings.

Impaired Driving

[67] The remaining issue is whether the evidence is sufficient to establish beyond a reasonable doubt that Mr. Davidson operated a motor vehicle while his ability to do so was impaired by alcohol. Counsel are agreed that Mr. Davidson was not in care and control of the vehicle when it was located by Csts. Caron and McEachen.

[68] The evidence of Mr. Ritchie would certainly be sufficient, in my view, to establish that the individual he spoke with was intoxicated and that he operated the vehicle in a manner that demonstrated that his ability to operate a motor vehicle was impaired by alcohol. However, Mr. Ritchie was unable to identify the individual he observed at trial due to the passage of time. Neither officer observed Mr. Davidson actually driving the vehicle. The issue then is whether the evidence is sufficient to establish beyond a reasonable doubt that the person observed by Mr. Ritchie was in fact Mr. Davidson.

[69] In my view, the Crown has put forward a strong circumstantial case in favour of the conclusion that Mr. Davidson was the driver of the vehicle observed by Mr. Ritchie.

[70] While Mr. Ritchie is unable to identify Mr. Davidson, he nonetheless provided a description of the driver as Caucasian, in his fifties, approximately 5’8”, and balding. The age range is somewhat older than Mr. Davidson’s actual age, but the description, though admittedly rather general, is otherwise consistent with Mr. Davidson’s appearance. The name of “Ronnie” that Mr. Ritchie thought he heard is extremely close

to “Robbie”, a diminutive of Mr. Davidson’s first name, Robert. Mr. Davidson is the registered owner of the vehicle that Mr. Ritchie observed being driven. The driver told Mr. Ritchie that he was going home. The address associated with the vehicle’s registration is in the industrial area of Whitehorse, and the very same vehicle observed by Mr. Ritchie was located by the police in the industrial area, though not at Mr. Davidson’s home address. Mr. Ritchie did not observe anyone with the driver, nor was anyone else in the area. The officers did not observe anyone other than Mr. Davidson with the vehicle when it was located, nor was there anyone else in the general vicinity. The time period between the dispatch received by the officers and locating the vehicle was only 17 minutes. The events all took place in the early morning hours sometime between 5:00 a.m. and 6:17 a.m.

[71] Clearly, the most logical inference to be drawn based on the circumstantial evidence is that Mr. Davidson was the same individual observed by Mr. Ritchie. The issue is whether there are other reasonable explanations capable of supporting an inference other than guilt.

[72] In *R. v. Villaroman*, 2016 SCC 33, at paras. 36-38, the Supreme Court of Canada addressed the issue of circumstantial evidence as follows:

> 36 I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

> 37 When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
>
> 38 Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[73] What then are the possible alternate explanations which would not give rise to an inference of guilt. Only two come to mind: either the vehicle observed by Mr. Ritchie and the vehicle located by the police were not the same vehicle; or someone other than Mr. Davidson was driving Mr. Davidson's vehicle, when observed by Mr. Ritchie.

[74] With respect to the first of these possible explanations, Mr. Davidson did tell Cst. Caron that the vehicle had been parked there for three hours suggesting that it had not been recently driven. However, in my view, any explanation suggesting the vehicle had not been operated by anyone in the preceding three hours flies in the face of the established evidence. Mr. Ritchie observed the vehicle being operated and was able to provide the license plate to dispatch; the vehicle located by the RCMP 17 minutes after the call from dispatch had that same license plate, and the warm lug nuts were consistent with recent driving.

[75] The only other possible explanation, inconsistent with guilt, would be that the individual observed by Mr. Ritchie operating the vehicle was someone other than Mr. Davidson, even though Mr. Davidson was the registered owner and was the individual found with the vehicle so soon after it was observed by Mr. Ritchie. In my view, this explanation would be no more reasonable in the circumstances of this case than the suggestion that the vehicle observed by Mr. Ritchie was not the vehicle found by the police. The similarity in physical description, the similarity in name, the fact Mr. Davidson was the registered owner, the fact Mr. Davidson was located with the vehicle shortly thereafter in his own neighbourhood, the fact this all takes place in the early morning hours, and no one else is observed by anyone in the vicinity all indicate that the driver and Mr. Davidson were one and the same.

[76] While I accept that lack of evidence does not render an explanation speculative, as noted by the Supreme Court of Canada above, on the facts of this case, absent any evidence that someone other than Mr. Davidson could possibly have been the driver, such an explanation simply defies common sense.

[77] In so concluding, I am mindful of the following passage in *R. v. Noble,* [1997] 1 S.C.R. 874, at para. 89, out of the Supreme Court of Canada:

> As set out above, silence is not inculpatory evidence, but nor is it exculpatory evidence. Thus, as in *Lepage*, if the trier of fact reaches a belief in guilt beyond a reasonable doubt, silence may be treated by the trier of fact as confirmatory of guilt. Silence may indicate, for example, that there is no evidence to support speculative explanations of the Crown's evidence offered by defence counsel, or it may indicate that the accused has not put forward any evidence that would require that the Crown

> negative an affirmative defence. In this limited sense, silence may be used by the trier of fact. If, however, there is a rational explanation which is consistent with innocence and which may raise a reasonable doubt, the silence of the accused cannot be used to remove that doubt.

[78] I am satisfied that there is no other reasonable explanation that would support an inference other than guilt on the facts before me. Accordingly, I am satisfied beyond a reasonable doubt, that Mr. Davidson was the driver of the vehicle observed by Mr. Ritchie and that Mr. Davidson's ability to operate a motor vehicle was impaired by alcohol. The offence of impaired driving has been made out, and a conviction will be entered.

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RUDDY T.C.J.