Citation: *R. v. Munro,* 2017 YKTC 46

Date: 20170912
Docket: 16-00126
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

JUSTIN DEAN ADAM MUNRO

Appearances:
Leo Lane — Counsel for the Crown
Richard S. Fowler — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Mr. Justin Munro stands charged that on May 8, 2016, in the city of Whitehorse, he operated a motor vehicle while impaired by alcohol and while his blood alcohol level exceeded the legal limit.

[2] Mr. Munro submits that his ss. 8 and 9 and *Charte*r rights were violated when he was unlawfully arrested and had breath samples seized in the absence of reasonable grounds that he had committed an offence contrary to s. 253 of the *Criminal Code*. In the result, it is argued that the breath test results should be excluded pursuant to s. 24(2).

[3] In the alternative, Mr. Munro alleges that his section 7 right was violated in that the police failed to maintain the WatchGuard video of the incident. The loss of this video should result in either a judicial stay of proceedings or in the investigating officer's evidence being excluded pursuant to s. 24(1) of the *Charter*.

[4] For the reasons that follow, I find that there was a breach of Mr. Munro's section 7 *Charter* right. Pursuant to s. 24(1), I am excluding some of the officer's evidence.

[5] As a result, I find that the police officer did not have reasonable grounds to make the breath demand.

Summary of the relevant facts

[6] Cst. Gillis of the Whitehorse RCMP detachment received notification from RCMP dispatch that a call had been received at 12:50 a.m. on May 8, 2016 with respect to a possible impaired driver. The officer received a description of the vehicle and learned that it was driving towards the downtown area of Whitehorse.

[7] The officer stated he was travelling on Wood Street when he noted on Second Avenue a tan ¾ ton pick-up truck with a non-functioning headlight, although in his notes, the officer had written that the suspect vehicle had a burned out tail light. Cst. Gillis believed the vehicle was going faster than the speed limit. He activated his emergency lights as he turned onto Second Avenue from Wood Street. Cst. Gillis noted that the truck was moving back and forth in its lane. The officer subsequently activated the police vehicle's horn to alert the vehicle of his presence and then followed the vehicle

for a period of time before it turned down Main Street and ultimately pulled into a parking stall on Front Street.

[8] The officer had the driver, Mr. Munro, exit the truck. There were two passengers in the vehicle, one in the front passenger seat and one in the rear seat. Both were highly intoxicated. As Mr. Munro exited, the officer noted an open case of beer on the front floor of the vehicle. He also observed a can of open beer in the centre console and an unopened beer in Mr. Munro's jacket pocket.

[9] Cst. Gillis indicated that Mr. Munro exhibited some slurred speech, red eyes and face, and a strong odour of alcohol on his breath. In coming to a decision to arrest Mr. Munro for impaired operation of a motor vehicle, the officer also considered the fact that it took him some time to pull over, that the vehicle had been moving back and forth in its lane, the initial complaint that the vehicle was 'all over the road', the speed of the vehicle, the beer observed in the vehicle and the fact that Mr. Munro had a closed beer can in his pocket.

[10] During cross-examination, counsel for Mr. Munro elicited from Cst. Gillis that, aside from what he had testified to, he has no notes indicating other unusual driving that might be expected from an impaired driver, such as the driver not signalling before turning left onto Main Street or the vehicle travelling at a high rate of speed as it took the turn from Second Street to Main Street. The officer also did not recall whether any of the parking stalls on Main Street were empty which would have allowed Mr. Munro to pull into one as soon as the officer signalled him to stop, rather than continuing on to an empty stall on Front Street.

[11] Cst. Gillis admitted that Mr. Munro did not display any difficulty in exiting the 'jacked-up' truck and that his balance did not appear unstable. He agreed that although Mr. Munro did not have his driver's licence with him, he provided his correct driver's licence number by memory. The officer had noted that the slurring he described was when Mr. Munro stated these numbers.

[12] Cst. Gillis admitted that he never asked Mr. Munro if he had consumed alcohol. He also agreed that alcohol has no smell and that what he smelled from Mr. Munro was the smell commonly associated with beverage alcohol.

Analysis

Failure to disclose recording

[13] The defence seeks a remedy as the result of an infringement of s. 7 of the *Charter* regarding the failure of police to disclose an audio and video recording from the in-vehicle WatchGuard recording system. The video recording system is automatically activated when the emergency lights of the police vehicle are initiated. This system includes a forward facing camera that records the view through the front windshield of the police car. It also has video and audio recording capacity within the police vehicle. An officer has the ability to carry a microphone that will record audio when outside of the vehicle.

[14] In this case, the Crown requested the WatchGuard recording on June 2, 2016 and subsequently on June 22 and June 25. On June 29, Cst. Gillis spent time with technical support people trying to locate the recording of Mr. Munro's stop. Although it

appears an electronic file was located on the detachment computer, Cst. Gillis and his colleagues were unable to locate any data.

[15] Some subsequent efforts were made to locate the recording, including by Daniel Stephenson, a technical support employee who testified on the *voir dire*. Mr. Stephenson became involved in this matter on August 31, 2016. He made unsuccessful efforts to locate the recording on a USB device provided to him by Cst. Gillis.

[16] Cst. Gillis admitted that on May 8, 2016, the day of the investigation, he had not removed the USB device from his police vehicle in order to secure the video and audio recording of this investigation.

[17] It is the Crown's obligation to disclose all relevant evidence in its possession, whether inculpatory or exculpatory and whether or not the Crown is intending to rely on it (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326). The corollary of this principle is that the Crown is required to preserve relevant evidence (*R. v. Egger*, [1993] 2 S.C.R. 451, and *R. v. La*, [1997] 2 S.C.R. 680).

[18] Although evidence may be unintentionally lost at times due to human error, the question to be resolved in this type of application is outlined in *La* at para. 20:

> ... Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the *Charter*. …

[19] In order to properly determine whether there has been unacceptable negligence, the circumstances of the loss of the evidence must be analyzed. As outlined in *La*, the principal consideration in this regard is whether or not the police or Crown took reasonable steps to preserve the evidence. The more relevant the evidence in question is, the greater the expectation that the police or Crown will make careful efforts to preserve it. A breach of s. 7 of the *Charter* ensuing from the failure of the Crown to meet its disclosure obligations may result in a stay of proceedings. However, this remedy is only appropriate in the clearest of cases (*R. v. O'Connor*, [1995] 4 S.C.R. 411).

[20] Sopinka, J. also stated in *La* at para. 24:

> The Crown's obligation to disclose evidence does not, of course, exhaust the content of the right to make full answer and defence under s. 7 of the *Charter*. Even where the Crown has discharged its duty by disclosing all relevant information in its possession and explaining the circumstances of the loss of any missing evidence, an accused may still rely on his or her s. 7 right to make full answer and defence. Thus, in extraordinary circumstances, the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial. In such circumstances, a stay may be the appropriate remedy, provided the criteria to which I refer above have been met.

Relevance of the recording

[21] Applying those principles to this matter, firstly, the lost video and audio recording was clearly relevant. The recording would have captured the driving pattern of Mr. Munro from the time of Cst. Gillis' first observation of the suspect vehicle, his pursuit of that vehicle on Second Avenue, its turn and progression on Main Street and finally, its turn and stop on Front Street.

[22] As the officer, for some unexplained reason, did not take the portable microphone with him upon exiting his vehicle, no audio recording of the initial interaction between the officer and Mr. Munro would have been available. However, a video recording of that interaction would have been produced. As well, once the officer placed Mr. Munro in the back of the police vehicle, interactions between the two would have been captured by both audio and video recording.

Whether there was a Charter breach

[23] In all the circumstances of this case, I find that Mr. Munro's s. 7 *Charter* right has been breached. As noted, the investigating officer did not take steps to preserve the video and audio recording until approximately eight weeks after the investigation. He did not, for example, remove the USB device which contained the recording from his vehicle and download it to the detachment computer. This was apparently done by someone else, although it is unclear when or by whom. There is no evidence that the person who attempted to download the USB recording made any effort to ensure that this had been done properly and that the file created on the detachment computer contained recording data.

[24] The *La* decision, at para. 21, considered the importance of steps taken to safeguard relevant evidence:

> …The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. …

[25] Considering the high relevance of the recording, the efforts made by the police in this case were not reasonable. As a result, I have concluded that the Crown has not satisfactorily explained the loss of evidence in this matter. I find that this loss of evidence was due to unacceptable negligence on the part of the police. I find that Mr. Munro has established actual prejudice to his ability to make full answer and defence.

The appropriate remedy

[26] The defence suggests that the two possible remedies are available a) a judicial stay of proceedings or b) the exclusion of Cst. Gillis' evidence. The Crown argues that, in the event of a finding of a *Charter* breach, only a portion of Cst. Gillis' evidence should be excluded.

[27] There are various decisions that have considered an appropriate remedy in circumstances where video evidence has been destroyed or lost. In the context of impaired driving cases, the decisions in *R. v. Maghdoori*, 2008 ONCJ 129, *R. v. Leung*, 2008 ONCJ 110, and *R. v. Yu*, 2008 ONCJ 153 involved police detachment video recordings destroyed after an elapsed retention period. In each of those cases, the destruction of the recording amounted to unacceptable negligence, resulting in a stay of proceedings.

[28] In *R. v. Sharma*, 2014 ABPC 131, the trial judge found a breach of s. 7 of the *Charter* where a police detachment video recording relevant to the offence of impaired driving had not been disclosed to the defence as requested. The videos had been routinely erased after 30 days, although the defence had made its request within that 30-day period. The Crown failed to provide a satisfactory explanation for the failure to

disclose the video recording. The Court excluded evidence of the police regarding their observations of the accused exiting the police vehicle and walking to the detachment.

[29] In *R. v. Dulude* (2004), 189 O.A.C. 323, the issue concerned a video recording of the taking of breath samples. The recording had not been preserved. Although a s. 7 *Charter* breach occurred, a stay of proceedings was not the appropriate remedy. The quality of the recording made it marginally relevant to the proceedings, as outlined at para. 19 of that decision.

> I find it difficult to see how these one-second vignettes placed fifteen seconds apart could be more than minimally helpful in challenging the evidence of the prosecution's two witnesses, the arresting officer and the breathalyser technician. ...

[30] At para. 20, the Court of Appeal stated:

> Of course, as Ms. Fairburn points out, if the tape were different or if the charge were different the defence would have a much stronger argument on relevance. For example, if there were a continuously running videotape of what went on in the breathalyser room, that tape would be highly relevant to the charges against Ms. Dulude. ...

[31] In contrast to *Dulude*, there is no indication in the matter before me that the video and audio recording produced by the WatchGuard system is of poor quality. The recording system captures events as they transpire.

[32] In terms of securing recordings which may be used as evidence in court, the WatchGuard system is user-friendly. Audio and video files are recorded directly to a USB device in the police vehicle. Importantly, the manner of transferring the recording from the police vehicle to the detachment computer is straightforward and not unduly time consuming. The portable USB device is simply removed from the police vehicle

and taken to a computer connected to external hard drives. The USB device is connected to the computer to initiate a transfer.

[33] At the time of transfer, it is easily determined whether a recording is properly downloaded or imported. If there is a problem in effecting the download, in other words if no data is imported to the computer, the USB device may be scanned by an information technology specialist in order to locate the recording.

[34] However, if a data transfer from a USB device to a detachment computer is unsuccessful and the person overseeing the transfer does not take the simple step of confirming importation before returning the USB device to the police vehicle, subsequent video and audio recordings placed on the USB may overwrite the un-transferred data, thus removing the initial recording.

[35] In other words, some care must be taken to ensure that the recording (i.e. the evidence) is preserved. Although not onerous, it is a necessary step.

[36] Unfortunately, in this case, no apparent steps were taken by police to ensure that the transfer of the recording from the USB device to the detachment computer had been successful. Weeks passed before it was determined that the importation of the recording had failed. It was not until almost three months after the investigation that a scan on the USB device was completed. By this time, the recording had been overwritten – it had effectively been destroyed.

[37] Although the recording would not have been lengthy, it would have captured whether the vehicle was moving quickly as it passed the intersection that Cst. Gillis was

approaching. It would have captured the manner in which Mr. Munro operated the motor vehicle as he was followed by police and his delayed reaction in pulling over when signaled to do so. It would have captured Mr. Munro exiting his vehicle. It would have shown Mr. Munro speaking in the back of the police vehicle, and provided an objective assessment as to whether he exhibited any slurred speech.

[38] It is also relevant that this type of loss of evidence was not an isolated incident in this jurisdiction. (see *R. v. Lavallee,* 2016 YKTC 57 and *R. v. Turner,* 2017 YKTC 31). The continued loss of relevant evidence is a concern which undoubtedly impacts negatively on public confidence in the administration of justice. The investigations in both *Lavallee* and *Turner* occurred in August 2015, approximately nine months before Cst. Gillis' investigation.

[39] Nonetheless, this is not one of those clearest of cases which should result in a judicial stay of proceedings. Unlike the *Turner* decision, Mr. Munro has not demonstrated a degree of irreparable harm that would justify such a sanction.

[40] A lesser remedy is appropriate in all the circumstances of this case. The decision of *R. v. Bjelland*, 2009 SCC 38, affirmed that remedies pursuant to s. 24(1) of the *Charter* are "flexible and contextual" (para. 18). In *R. v. Biddersingh*, 2015 ONSC 8138, evidence which was the subject of late disclosure was excluded from the trial.

[41] As outlined in *R. v. Buyck,* 2007 YKCA 11, at para. 34:

> The degree of prejudice resulting from the breach of an accused's ***Charter*** right is, however, relevant to the remedy for the breach...

[42] In the matter before me, the exclusion of some of Cst. Gillis' evidence is a reasonable remedy given the nature of the violation, as well as society's interest in a resolution of the matter on its merits. It would be appropriate to exclude the officer's evidence which would have been captured by the WatchGuard system.

[43] This would include the observation of the speed of the truck, the manner in which Mr. Munro was operating it, his delay in not pulling over, the red face, red eyes and the slurred speech.

[44] I should point out that the police vehicle's front facing camera may not have captured the redness of Mr. Munro's face and eyes as noted by Cst. Gillis, however, the back facing camera would have provided a visual of Mr. Munro as he was seated in the back seat minutes later. As Cst. Gillis neglected to take the portable microphone with him when he exited his vehicle, no recording would have existed regard his initial interaction with Mr. Munro. However, as mentioned, the audio recording of when Mr. Munro was in the police vehicle would have captured his manner of speech.

Reasonable grounds to arrest and make a breath demand

[45] It is the Crown's burden to establish that reasonable grounds existed for the arrest and subsequent breath demand (*R. v. Bush*, 2010 ONCA 544, *R. v. Haas* (2005), 76 O.R. (3d) 737 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 423).

[46] There is both a subjective and objective component to the reasonable grounds test. The officer making the demand must have an honest belief that the driver committed an offence contrary to s. 253 of the *Criminal Code* and that belief must be

objectively reasonable (*R. v. Bernshaw,* [1995] 1 S.C.R. 254 and *R. v. Usher*, 2011 BCCA 271).

[47] In *R. v. Gunn*, 2012 SKCA 80 the Court noted, at para. 8, that:

> Where an individual challenges the validity of a breath-demand on the basis that the police officer's belief was not reasonable, the question for the trial judge is whether, on the whole of the evidence adduced, a reasonable person standing in the shoes of the officer would have believed the individual's ability to operate a motor vehicle was impaired (see: *R. v. Storrey*, [1990] 1 S.C.R. 241, at p. 250; and *R. v. Restau*, 2008 SKCA 147, 314 Sask. R. 224 at para. 17). …

[48] And later at para. 15:

> In a *voir dire* held to determine the reasonableness of the police officer's belief, the trial court must consider whether the observations and circumstances articulated by the officer are rationally *capable* of supporting the inference of impairment which was drawn by the officer; however, the Crown does not have to prove the inferences drawn were true or even accurate. In other words, the factors articulated by the arresting officer need not prove the accused was actually impaired. This is so because that is the standard of proof reserved for a trial on the merits (*i.e.,* proof beyond a reasonable doubt).

[49] The *R. v. Wang*, 2010 ONCA 435 decision considered the guidance provided in *R. v. Shepherd*, 2009 SCC 35, and summarized at para. 17 that:

> …where a court is satisfied that the officer had the requisite subjective belief, the sole remaining issue is whether that belief was reasonable in the circumstances. The test is not an overly onerous one. A *prima facie* case need not be established. Rather, when impaired driving is an issue, what is required is simply that the facts as found by the trial judge be sufficient objectively to support the officer's subjective belief that the motorist was driving while his or her ability to do so was impaired, even to a slight degree, by alcohol: see *R. v. Stellato*, (1993), 12 O.R. (3d) 90 (C.A.), aff'd [1994] 2 S.C.R. 478.

[50] Turning to the facts in this case, assuming that the officer had the requisite subjective belief that Mr. Munro had committed an offence pursuant to s. 253 of the *Code*, the more difficult question is whether that belief was objectively reasonable. In assessing this standard, as summarized in *R. v. Kurmoza*, 2017 ONCJ 139, at para. 33, it is important to remember that:

> …
>
> > Evidence must be considered cumulatively, and not piecemeal.
> >
> > The reasonable grounds standard must be interpreted contextually, and take into account all the circumstances, including the timing involved and the events leading up to the arrest or demand. Police officers must make decisions quickly, in circumstances that are less than ideal, and on the basis of information available to them at the time, which is sometimes incomplete.
> >
> > Reasonable grounds can be established despite the fact that there may be competing explanations for individual factors that contribute to the officer's belief. The officer is only required to consider the incriminating and exonerating information to the extent that the circumstances reasonably permit. The inference that the subject is impaired may be reasonable even if it is not the only inference that can be drawn from the circumstances. "Reasonable grounds to believe" does not require the officer to be in a position to dispel or rule out innocent or innocuous inferences that may be drawn from the same observations.
> >
> > [Footnotes omitted)

[51] At the same time, as noted in *R. v. Baltzer,* 2011 ABQB 84, at para. 38:

> Impairment is objectively found in matters such as coordination, comprehension and a poor (but not simply illegal) driving pattern. When there are objective findings of a lack of coordination, a lack of comprehension or a poor driving pattern coupled with evidence of alcohol consumption, the dots are connected and there is an objective basis to

> conclude that the driver's ability to drive is impaired by alcohol. This does not mean that once there is some minimal evidence of impairment and some minimal evidence of alcohol consumption the "reasonable" standard is met. That still requires consideration and analysis of the totality of the circumstances. It flows that two "minimals" do not likely amount to reasonable and probable grounds; two "strongs" do. There is an area of judgment call within those clear extremes, which must also be exercised in conjunction with the police officer's honest, subjective belief that he or she had reasonable and probable grounds to make the arrest or make a breath sample demand.

[52] In the matter before me, the facts which could support a finding that Cst. Gillis' subjective belief was objectively reasonable are:

- The officer received via dispatch a complaint of a ¾ ton truck all over the road and heading to the downtown area of Whitehorse, and the vehicle the officer stopped in the downtown area matched this description;
- The officer noted an open case of a beer on the front floor of the truck, as well as an open beer in the centre console;
- Mr. Munro had a closed beer can in his pocket;
- There was a strong odour of 'beverage alcohol' emanating from Mr. Munro's breath;

[53] However, the defence points to the fact that the officer observed no issues with Mr. Munro's balance or coordination, that he responded appropriately to questions, and that he was capable of providing his driver's licence number from memory. He also appeared to understand the warnings read to him, and he requested to speak to a specific lawyer.

[54] The defence also highlights the short investigation conducted by the officer prior to Mr. Munro's arrest.

[55] On balance, I conclude that the evidence available to the officer, including the civilian complaint, the strong smell of alcohol from Mr. Munro's breath, and the evidence of beer in the vehicle and in his jacket pocket is insufficient to amount to objectively reasonable grounds for the breath demand.

[56] This finding results in a breach of sections 8 and 9 of the *Charter*.

[57] The Crown has fairly conceded that if I conclude that the officer did not possess reasonable grounds for the breath demand, it would be inappropriate in these circumstances to consider whether the evidence should be nonetheless admitted pursuant to s. 24(2).

[58] Absent a s. 7 *Charter* breach, I may well have found that Cst. Gillis had reasonable grounds for the breath demand. However, the excluded evidence removes a number of the factors the officer relied upon in coming to his decision.

[59] As a result, I find that there were insufficient objectively reasonable grounds for the demand. Therefore, the breath results are inadmissible.

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CHISHOLM T.C.J.