Citation: *R. v. Painchaud*, 2015 YKTC 29

Date: 20150806
Docket: 14-10103
Registry: Watson Lake

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Orr

REGINA

v.

RONALD DAVID PAINCHAUD

Appearances:
Christiana Lavidas — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR JUDGMENT AND SENTENCING

[1] ORR J. (Oral): Ronald David Painchaud has been charged that he did:

(i) On or about February 18, 2015, at Watson Lake, Yukon Territory, while his ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle contrary to s. 253(1)(a) of the *Criminal Code*; and

(ii) On the same date, same place, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 mg/100mL of blood, did operate a motor vehicle contrary to s. 253(1)(b) of the *Criminal Code*.

[2] The accused has filed an application indicating that he is seeking as a remedy, to exclude evidence pursuant to s. 24(2) of the *Charter*, namely the breathalyzer readings. This application is based on ss. 8 and 24(2) of the *Charter.* The grounds are: that the arresting officer made the ASD demand based on a previous stop for impaired driving (where the applicant was found to not be impaired), and on anonymous information received in the past about alleged impaired driving; the arresting officer had no reasonable suspicion to make an ASD demand; in the absence of a legal ASD demand, the arresting officer had no reasonable and probable grounds to demand a breath sample for the breathalyzer; the breathalyzer demand constituted a warrantless search; the breath samples were not obtained as soon as practicable, pursuant to s. 258 of the *Criminal Code*; and the above was a breach of the applicant's rights under s. 8 of the *Charter*.

[3] Those were the grounds upon which the matter came before the Court.

[4] At the outset, I should specify that the issue with respect to the samples not being obtained as soon as practicable, pursuant to s. 258, certainly was not argued. The evidence before the Court would indicate that the samples in this particular matter were taken as soon as practicable in the circumstances. The case law certainly indicates that is not "as soon as possible" that is required. The time within which this matter had transpired was clearly set out as to what had occurred with respect to Mr. Painchaud and there were certainly no unexpected or inappropriate delays with respect to that process. As the samples were taken as soon as practicable in these particular matters, that ground has certainly not been made out.

[5] In this case, s. 106 of the Yukon *Motor Vehicles Act,* R.S.Y. 2002, c. 153 provides:

> Every driver shall, on being signalled or requested to stop by a peace officer in uniform, immediately
>
> (a) bring their vehicle to a stop;
>
> (b) furnish any information respecting the driver or the vehicle that the peace officer requires; and
>
> (c) remain stopped until they are permitted by the peace officer to leave.

[6] The indications are that this legislation has not been subject to any judicial interpretation since the Supreme Court of Canada decisions in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, and *R. v. Wilson*, [1990] 1 S.C.R. 1291. Both decisions were issued on the same date in 1990.

[7] *Ladouceur* dealt with whether routine checks and random stops of motorists by the police, violated the *Charter* and, if so, whether that could be justified by s. 1 of the *Charter*. *Ladouceur* dealt with Ontario legislation.

[8] The companion case of *Wilson*, dealing with the Alberta legislation, as noted, was decided on the same date as *Ladouceur*. The Alberta provisions that were under review by the Supreme Court of Canada mirror that of s. 106 of the *Motor Vehicles Act* of the Yukon.

[9] In *Ladouceur*, at para. 60 of the Supreme Court of Canada decision, Cory J. stated:

> Finally, it must be shown that the routine check does not so severely trench upon the s. 9 right so as to outweigh the legislative objective. The concern at this stage is the perceived potential for abuse of this power by law enforcement officials. In my opinion, these fears are unfounded. There are mechanisms already in place which prevent abuse. Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where a stop is found to be unlawful, the evidence from the stop could well be excluded under s. 24(2) of the *Charter*.

[10] Continuing at para. 62, Cory J. stated:

> In the result, I have concluded that routine checks are a justifiable infringement on the rights conferred by s. 9. ...

[11] At para. 63, in conclusion, Cory J. stated:

> While the routine check is an arbitrary detention in violation of s. 9 of the *Charter*, the infringement is one that is reasonable and demonstrably justified in a free and democratic society. As a result, s. 189*a*(1) of the *Highway Traffic Act* is a valid and constitutional legislative enactment. There is no need to read the section down as did Tarnopolsky J.A. in the Court of Appeal or to… qualify it in any way. Having come to this result, it is not necessary to deal with the arguments raised under s. 24(2).

[12] So that's dealing with the Ontario legislation.

[13] In looking at the decision in *Wilson*, issued by the Supreme Court of Canada on the same date, Cory J., stated:

> [11] With respect to the first point, the appellant argued that s. 119 of Alberta's *Highway Traffic Act* is similar to the statutory provisions considered in *Dedman v. The Queen*, [1985] 2 S.C.R. 2, and does not grant statutory authority for random stops. I cannot accept that contention. Section 119 of the Act reads:
>
> > **119** A driver shall, immediately upon being signalled or requested to stop by a peace officer in uniform, bring his vehicle to a stop and furnish any information respecting the driver or the vehicle that the peace officer requires and shall not start his vehicle until he is permitted to do so by the peace officer.
>
> Though s. 119 imposes duties upon motorists rather than conferring powers on the police, the language of this section is broad enough to authorize random stops of motorists by police officers. In contrast to the legislative provisions considered in *Dedman*, *supra*, s. 119 requires a driver not merely to surrender his licence on demand, but when "signalled or requested to stop", to "bring his vehicle to a stop and furnish any information respecting the driver or the vehicle that the peace officer requires". Constable MacFarlane's actions in stopping the appellant were therefore statutorily authorized by s. 119 of the *Highway Traffic Act*.
>
> [12] With regard to the second point, the appellant's arguments that the stopping was unconstitutional can be dismissed on two bases. First, if the stopping of the appellant's vehicle is considered to be a random stop then for the reasons given in *Ladouceur*, *supra*, I would conclude that although the stop constituted an arbitrary detention, it was justified under s. 1 of the *Charter*.

[14] He went on to discuss the second basis, but I don't believe it's relevant in this particular matter.

[15] The identical provisions in Alberta have been found to be inconsistent with s. 9 of the *Charter,* but justified pursuant to s. 1 of the *Charter*. There is nothing before me to alter or vary such a determination as made by the Supreme Court of Canada and

therefore, s. 106 of the *Motor Vehicles Act*, for the reasons set out in *Ladouceur* and in *Wilson*, while it does infringe s. 9 of the *Charter*, that infringement is justified, pursuant to s. 1 of the *Charter*.

[16] The question then becomes: What were the actions of Cst. Draper in respect of this matter and were those actions a random stop?

[17] Counsel for the defence, in respect to this matter, has referred to a number of definitions of “random". According to *Black's Law Dictionary*:

> Random - events or data that acts of its own accord. It will show no recognised pattern or direction that can be plotted for the anticipation of future actions. A random event or action is not planned and cannot be determined.

[18] Definitions provided from other dictionaries included: not planned; cannot be determined in advance; happening without conscious decision; haphazard course; and happening, done or chosen by chance rather than according to a plan.

[19] Here we have, according to the testimony of Cst. Draper, that he is on patrol and there is no indication that he had any reason to expect that he would see Mr. Painchaud during that patrol. He testified that he had stopped a number of vehicles during his shift to confirm driver sobriety. He acknowledged that he had had previous dealings with Mr. Painchaud. He had stopped him in January, 2015 for not wearing a seatbelt and to determine driver sobriety.

[20] A key factor in respect of this matter is the testimony of Cst. Draper that he had seen Mr. Painchaud operating a motor vehicle on other occasions between when he

had stopped him in January, 2015 and the date of the stop that is the subject of this trial, on February 18, 2015. He had seen him operating a vehicle but had not stopped him on those other occasions. Cst. Draper acknowledged that he had anonymous information prior to the January 15, 2015 stop with respect to Mr. Painchaud, alleging that Mr. Painchaud operated motor vehicles while he was under the influence of alcohol. I believe it was more specific than that, that the information was he was impaired. The January 15, 2015 stop did not apparently result in any *Criminal Code* charges.

[21] As noted in the case of *R. v. Nguyen*, [2007] O.J. No. 4148 (S.C.), the Court indicated:

> [12] The decision of the Court of Appeal in *Brown* also helps me with a submission that was made by counsel for the respondent that the trial judge's findings of fact were determinative in all respects. As the Court noted in *Brown*, it is important not to confuse "the question of whether the police had cause to stop [the vehicle] with the question of the purpose for the stop."

[22] In this case, Cst. Draper testified that his purpose in stopping the vehicle that he saw approaching, and that he recognized to be the vehicle of Mr. Painchaud, was in order to check driver sobriety. On the evidence that is before me in respect of this matter, I am satisfied beyond a reasonable doubt that the actions of Cst. Draper on February 18, 2015, in stopping the vehicle in question, did constitute a random stop as set out by the various definitions, particularly *Black's Law Dictionary* and the other dictionaries that have been referred to. It was a random stop within that context and within the context of the *Ladouceur* and *Wilson* decisions of the Supreme Court of Canada.

[23] Upon having contact with Mr. Painchaud, Cst. Draper made a number of observations of Mr. Painchaud. Cst. Draper acknowledged that he only observed the vehicle driving for a very short distance and there was nothing out of the ordinary during the time that he observed the vehicle being driven. His purpose in stopping the vehicle was to check driver sobriety. He testified as to his experience in dealing with impaired cases, indicating he had been involved in approximately 250 cases during the course of his 10 years as a member of the RCMP.

[24] As soon as Cst. Draper got to the vehicle, the driver began to open the driver's door. He recognized him to be Mr. Painchaud from his previous dealings. He immediately smelled a moderate odour of alcohol with a pickle smell coming from the vehicle. He asked for licence and registration. Mr. Painchaud was able to provide registration and insurance without any issue, but not his licence.

[25] Mr. Painchaud indicated he had already been checked and was confused as to why he would be checked again, when the officer had indicated he had stopped him to check his sobriety. Mr. Painchaud exited the vehicle. When he got outside there was a strong odour of alcohol coming from the breath of Mr. Painchaud as well as the pickle smell. His eyes were glassy and bloodshot. He had a flushed face.

[26] Cst. Draper had him walk to the police vehicle. Mr. Painchaud was cooperative and did so. Cst. Draper described his walk as being a slow, deliberate walk. When Mr. Painchaud got to the police vehicle, he leaned against the patrol car with his left arm. As a result of the officer having a suspicion that Mr. Painchaud had alcohol in his body and had operated the vehicle within the previous three hours, he read him the

ASD demand. He indicated that his grounds for doing so were the strong odour of alcohol coming from the breath of Mr. Painchaud; glassy eyes; slow speech; slow, deliberate walk; and him leaning on the police car when he had arrived at the police car.

[27] Cst. Draper read the ASD demand to Mr. Painchaud and described the various procedures that he went through in order to administer the approved screening device to Mr. Painchaud. He provided a suitable sample; the result of that sample was a fail. Cst. Draper was asked as to what that meant. He indicated that a fail meant that there was a reading of over 100 milligrams of alcohol in 100 millilitres of blood, and as a result of that, he then indicated that he came to the determination, the opinion, that Mr. Painchaud had operated a motor vehicle within the preceding three hours and that his ability to do so was impaired by alcohol, and he then read him the breathalyzer demand.

[28] Cst. Draper was asked as to the grounds upon which he had made the demand for the breathalyzer to Mr. Painchaud. He testified that the grounds were the physical symptoms that he had observed and the "fail" reading on the approved screening device. He then chartered and cautioned Mr. Painchaud. Tests were administered to Mr. Painchaud by another member, who was a qualified technician. The results of those tests were admitted into evidence on the *Charter voir dire*.

[29] The case law, again, is quite clear.

[30] The Supreme Court of Canada in *R. v. Storrey,* [1990] 1 S.C.R. 241*,* a decision of Cory J., stated at para 17 that:

> … the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.

[31] In those days, it was "reasonable and probable grounds." The *Criminal Code* has since been amended to delete the reference to "probable".

[32] In basic terms, police officers cannot set themselves up to be judge and jury at the scene.

[33] The officer in this case, Cst. Draper, made particular observations, came to a conclusion, and that conclusion was that the ability of Mr. Painchaud to operate a motor vehicle was impaired by consumption of alcohol. As a result, he arrested him and he then became subject to a demand for a sample of his breath to determine the concentration of any alcohol in his blood. I am satisfied on the evidence that is before the Court that Cst. Draper honestly came to that determination, that he subjectively had reasonable grounds upon which to base that arrest.

[34] The question is for the Court, looking at those grounds, to determine whether or not they are justified on the basis of a reasonable person placed in the position of the officer, would they conclude that there were reasonable grounds for the arrest?

[35] As noted, what we have in this matter is there is no indication of difficulties over the short distance in which the officer observed the vehicle being driven, and no difficulties in which the driver was operating the vehicle. As soon as the vehicle passed

where the police car was, it was signalled to pull over, and it immediately pulled over. The immediate observations of the officer were a smell of alcohol coming from the vehicle when Mr. Painchaud was getting out of his vehicle. He produced his insurance and registration. He was advised that he was being stopped in order to check his sobriety. He seemed to be confused as to why that would occur, since he had been checked previously. When he got out of the vehicle, there was a strong odour of alcohol from his breath as well as his pickle smell; glassy, bloodshot eyes; and a flushed face. When he walked to the vehicle, it was in a slow, deliberate walk. When he got the passenger side he leaned against the patrol car with his left arm. The officer indicated his speech was slow. Although Mr. Painchaud was described, on cross-examination, as not having any difficulty with walking, it was described as a slow, deliberate walk.

[36] Cst. Draper was also asked as to whether he had opportunity to observe Mr. Painchaud walk on other occasions. He was asked specifically with respect to the incident back in January, and I think it should be noted that the observations that were put to him from the January incident were quite different than those that the officer had with respect to this particular matter on February 18, 2015 that constitute the charge before the Court. He indicated that he had an opportunity to see Mr. Painchaud walking out of the corridor outside Court here today, and that he appeared to be moving a bit faster than he had been on February 18, 2015.

[37] With respect to Mr. Painchaud's speech, Cst. Draper indicated he had not noted any differences with respect to that. He had spoken to him for a fairly lengthy period of time during the periods of observation that he had made on February 18, 2015 while the

tests were being administered, and he had not had the opportunity to speak to him for a similar length of time, to note any differences in his speech with respect to that. He indicated there was no slur to his speech, but it was a slow speech.

[38] Cst. Draper indicated there was no issue with respect to fumbling when producing his papers. The walk had been slow and deliberate, in a straight fashion, but he described it as though it was the sort of thing that had to be worked on. Mr. Painchaud didn't stumble but he leaned against the police car. He indicated that he has had a few people lean up against the police car at the roadside, usually in the context of where they had to steady themselves, as opposed to simply leaning there for the sake of doing so.

[39] Looking at the circumstances of this particular matter, the basis upon which the demand was made and all of the circumstances here, I am satisfied that a reasonable person, placed in the position of the officer, would conclude, as I do, that there were reasonable grounds in this particular matter for Cst. Draper to arrest Mr. Painchaud, given the physical observations that he made of him, as well as the results of the approved screening device, the fail that resulted from the administration of that test; and I conclude that there were reasonable grounds upon which for him to arrest Mr. Painchaud for impaired operation of a motor vehicle and to require him to provide samples of his breath, pursuant to s. 254 of the *Criminal Code*.

[40] One of the grounds that was raised in the notice that was filed was that the arresting officer had no reasonable suspicion to make an ASD demand. That was not argued in this matter, but certainly the evidence before me would indicate that there

were ample grounds upon which the officer could reasonably suspect that Mr. Painchaud had alcohol in his body, that being the strong odour of alcohol coming from his breath, as well as his acknowledgment that he had had a beer at lunch, around 12:30 p.m., the stop having been made just a short time later than that, on the same day.

[41] In all of the circumstances of this particular matter, I am not satisfied that there has been any breach of the applicant's rights under the provisions of the *Charter*, as alleged in the notice that has been filed here, under s. 8 of the *Charter*. I am not satisfied that there has been any breach of Mr. Painchaud's rights under the *Charter* on the evidence that is before me. Therefore, the results of the breathalyzer will be admitted, which is the certificate that has been marked and entered in the course of the *voir dire*.

[42] With respect to the evidence that was heard at the *voir dire*, counsel have agreed that that evidence is to be considered as part of the trial, and no further evidence has been called in respect of the matter.

[43] On the basis of the evidence that is before me from the *voir dire* now incorporated into the trial, I am satisfied that the Crown has established beyond a reasonable doubt that, on the date in question, Mr. Painchaud, having consumed alcohol in such quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, did operate a motor vehicle contrary to s. 253(1)(b) of the *Criminal Code*. The readings in respect of that matter were 210 for the first test and 200 for the second test. There will be a conviction with respect to Count #2.

[44] With respect to Count #1, impaired operation, the test for impairment has been set out by the Supreme Court of Canada in *R. v. Stellato*, [1994] 2 S.C.R. 478. The cases filed, particularly *R. v. Baltzer*, 2011 ABQB 84, review a number of scenarios as to what, in a variety of matters, constitute impaired operation of a motor vehicle or otherwise. In *Baltzer*, Graesser J. drew his own conclusions as to what he felt the analysis of those cases would mean. He did indicate there were a myriad of cases that talked about the variety of issues that would be looked at, and referred to the decision in *R. v. Shepherd,* 2009 SCC 35.

> [31]... There, the Supreme Court held that the objective standard was met where the accused:
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> - demonstrated a pattern of unlawful driving (running a stop sign, speeding and evading the police);
> - failed to stop because he incorrectly believed the police car to be an ambulance;
> - had red eyes;
> - appeared lethargic and fatigued;
> - had the smell of alcohol on his breath; and
> - moved slowly and deliberately.
>
> [32] The Supreme Court did not say that all of these indicia had to be present, or how many of them were required, or what other factors might be considered.

[45] At para. 38, Graesser J. stated:

> [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 ...

[46] I am not so sure that everyone would necessarily agree with that analysis, but it is certainly of assistance to look at how one court has looked at the issue.

[47] Once there is some evidence of alcohol consumption and some evidence of impaired driving skills, the analysis becomes a matter of looking at the degree of each in assessing the totality of the circumstances.

[48] In this particular matter, applying *Stellato*, the question is whether the accused's ability to operate a motor vehicle has been impaired by alcohol. Certainly, there are indications that the accused had a strong odour of alcohol; glassy and bloodshot eyes; and deliberate, slow movements in his walk. There was no indication of any poor coordination and there was no specific driving evidence in respect of this matter. There are no difficulties with the manner in which he operated the vehicle for the short period of time that it was observed. In all of the circumstances of this particular case, I am not satisfied that the Crown has established that the accused's ability to operate the motor vehicle in the particular circumstances before the Court in this matter were impaired by alcohol, as set out in s. 253(1)(a).

[49] I enter the acquittal with respect to Count #1 and, as noted, the conviction on Count #2, for the reasons I have already noted.

[50] Just to confirm, Count #1 is the impaired operation; Count #2 is the over 80 mg/100mL operation. So the conviction is on Count #2.

[51] With respect to this matter, considering the evidence that I have heard, we are dealing with a charge under s. 253(1)(b). As Parliament has noted, any readings above 160 mg/100mL are an aggravating factor. I have to consider the lower of Mr. Painchaud's two readings, which is the 200 mg/100mL. Again, that's well above the aggravating threshold in this matter.

[52] A further aggravating factor to be considered is that this matter occurred in the middle of the afternoon on February 18, 2015. February 18, 2015 was a Wednesday, the middle of the week, when one would anticipate that there would be, even in the Yukon, even in the middle of February, that there would be people out and about. In particular I am concerned about children being out and about in the middle of the afternoon. It is not like it is two in the morning when the impact on the public might be a little less. Those readings are very high for that point of -- well, for any time but certainly the danger to the public and those who might be out there are very high at that point in time.

[53] It always amazes me when I am advised that somebody has a great deal to lose by losing their licence, as to how it will impact on their employment, as they need their licence in order to do their work effectively, and how they would put themselves in a position where they would put that employment in jeopardy. We are not talking about somebody who just had one drink too many. When you blow 200 mg/100mL in the middle of the afternoon, certainly we are talking about well and above that. It is not just

a minor situation where a person has misjudged their consumption and they have just blown 100 mg/100mL and it is just over the legal limit. Mr. Painchaud is two and a half times the legal limit in respect of this matter.

[54] In the circumstances, I consider the prior record, which as noted is quite dated, it is not related, and really is of very little impact in respect of this matter. In fact, I would suggest it is of almost no impact, other than to say that Mr. Painchaud does have a criminal record.

[55] In the circumstances of this matter, I believe that the appropriate penalty in order to bring home to you and others that there are consequences to drinking and driving -- and when I say drinking and driving, it is in the sense of operating a vehicle while the quantity of alcohol in your body exceeds the legal limit, and exceeds it in a substantial manner -- in the circumstances, I am going to impose a fine of $1,800, together with an assessment for the Victims of Crime Fund of $540.

[56] You are prohibited from operating a motor vehicle on any street, road, highway, or other public place for a period of 18 months from today's date. I consider that that is the appropriate penalty, as opposed to a lower driving prohibition and a higher fine, given the readings and the time of day in which this matter occurred.

[57] It is an offence under s. 259(4) of the *Criminal Code* to operate a motor vehicle now that you have been prohibited from doing so.

[58] You will have six months to pay the fine and the assessment.

[59] There will be a fine order in respect of this matter. You are required to attend at the Court Registry in order to both sign the fine order and the driving prohibition that will be prepared and provided to you at that time, sir, before you leave the building today.

_____

ORR T.C.J.