

Citation: *R. v. Ballantine*, 2010 YKTC 120

Date: 20101014
Docket: 09-00278
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

JAMES MCNAB BALLANTINE

Appearances:

Terri Nguyen
James Ballantine

Counsel for the Crown
Appearing on his own behalf

REASONS FOR JUDGMENT

[1] FAULKNER T.C.J. (Oral) James McNab Ballantine is charged with operating a motor vehicle while his ability to do so was impaired by alcohol or a drug, and with refusing to provide breath samples. Both offences are alleged to have occurred on the 4th of May of 2009.

[2] I will deal first with the charge of refusing to provide breath samples. The evidence is that after Mr. Ballantine was arrested, he indicated a desire to contact counsel of choice, a Mr. Hope in Fort St. John. Some considerable efforts were made by the investigating constable to get in touch with Mr. Hope. Now, this included allowing Mr. Ballantine to make phone calls to a friend and a sister, as I understand it,

in an attempt to get Mr. Hope's number. In addition thereto, the constable went to the effort of conducting an Internet search, which ultimately produced Mr. Hope's phone number. That resulted in a phone call to Mr. Hope's office. Not surprisingly, perhaps, given the time of day, that phone call did not reach Mr. Hope but simply got the answering machine. A message was left for Mr. Hope to call back. That was at 10:51 p.m. on the evening in question.

[3] Some three minutes later, the investigating constable, Constable Wallingham, provided the accused with a telephone book which would presumably allow him to look for the names of other lawyers who were listed therein, and also suggested that Mr. Ballantine could speak to Legal Aid. Given the time of driving the vehicle, and given the time that had gone by, there was clearly some urgency in proceeding with the investigation since the two hours was beginning to tick by and, as Constable Wallingham himself said, he needed to wrap this matter up and get back on the road and carry on with his job.

[4] However, the way in which Mr. Ballantine was deflected from his counsel of choice to Legal Aid is, I think, somewhat problematic. It would have been quite fair for Constable Wallingham to say to Mr. Ballantine, "Look, time is going by. There is some urgency of time in the matter and it does not appear that you are going to be able to get hold of your counsel of choice. Here is an option for you. Would you like to do that?" It just seems to have been presented to Mr. Ballantine not as an option, but as the sole choice that he had.

[5] The Supreme Court of Canada actually very recently, in a trilogy of cases, dealt

with this issue and it is pretty clear that an accused cannot insist upon counsel of choice forever and a day, particularly when there is some urgency with the investigation. But in this case, there were only three minutes that elapsed between the time the message was left and the time that Constable Wallingham provided Mr. Ballantine with the phone book and Legal Aid's number. As I say, it is not clear as to how Mr. Ballantine was moved off of the desire to call counsel of choice and on to the Legal Aid option.

[6] I think in the circumstances, and particularly given the fact that Mr. Ballantine is unrepresented here today, so that the issue of his right to counsel has, perhaps, not been explored as well as it might have been, and recognizing where the onus of establishing a *Charter* breach ultimately lies, (which is on Mr. Ballantine), nevertheless, I think, on balance, it appears to me that his right to counsel was breached. In reaching that conclusion, I make no finding whatever that Constable Wallingham acted improperly or in bad faith or anything of that kind.

[7] That being the case, and without going into any long-winded analysis of the rules relating to exclusion, but certainly keeping those in mind, I think that the evidence relating to Mr. Ballantine's dealings with Constable Wallingham and the Datamaster C should be excluded. Consequently, Count 1 should be dismissed.

[8] With respect to Count 2, which is the charge of impaired driving, the evidence here is that Constable Wallingham followed the accused for some three kilometres. He noticed a driving pattern which, in my view, is significant. The vehicle was weaving on the road, certainly more than once across the centre line of the road, and was touching

the shoulder line twice. Once Mr. Ballantine was stopped, there was an odour of alcohol from his breath; there was an admission that he had consumed four beers relatively recently; there was some difficulty in finding his documents; there was evidence of swaying or slight staggering as he stood, and although there is no evidence that Mr. Ballantine had difficulty with speech or was exhibiting confusion or anything of that kind, in other words that he was grossly intoxicated, there is, nevertheless, in my view, sufficient evidence for the Court to conclude that his ability to operate a motor vehicle was impaired by alcohol to at least the degree required by law and as set out in the *Stellato* case, [1993] O.J. No. 18; affd. [1994] 2 S.C.R. 478.

[9] I find the accused guilty on Count 2.

FAULKNER T.C.J.