Citation: *R. v. Turner*, 2017 YKTC 31 Date: 20170606
Docket: 15-00391
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

SAUL MICHAEL TURNER

Appearances:
Leo Lane — Counsel for the Crown
Richard S. Fowler (by telephone) — Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM J. (Oral): Mr. Saul Turner faces charges that he operated a motor vehicle while his ability to do so was impaired by alcohol and that he refused to comply with a police demand to provide breath samples. These offences are alleged to have occurred on August 3, 2015, in the City of Whitehorse.

[2] The defence submits that the failure of the police and Crown to disclose the audio and video recording from the investigating officer's vehicle's recording system is a breach of Mr. Turner's *Charter* rights. The appropriate remedy, the defence suggests, is a judicial stay of proceedings.

[3] In the event that a judicial stay is not granted, the defence submits that the police did not have reasonable grounds to make the breath demand in the circumstances of this case and therefore such demand was invalid.

[4] The defence additionally argues that, if the demand was valid, Mr. Turner's words and actions, when read the breath demand, were ambiguous and that Mr. Turner did not refuse in law to provide a breath sample.

[5] The defence also submits that the Crown has not proved the essential elements of the impaired driving charge.

[6] The Crown called its evidence in a *voir dire* and counsel agreed that the evidence deemed admissible would become part of the trial proper and that no further evidence would be called. The Crown called the investigating officer and the defence called no evidence.

Relevant Facts

[7] Whitehorse RCMP dispatch received a complaint just after midnight on August 3, 2015. The complainant indicated that a male, with whom the complainant had been consuming alcohol, had left the Boiler Room Lounge on 4th Avenue and was walking towards his white Ford truck. The caller was concerned that this male was going to drive the vehicle.

[8] Cst. Jury received this information and drove to that location. She indicated it took her about three minutes to do so. The parking lot was very full. She observed a white Toyota Tundra pickup truck in a parking stall, which was running with its

headlights illuminated. As she continued to look for her suspect vehicle in the parking lot, she noted the Toyota pickup exiting the parking lot at a high rate of speed. As the officer did not locate a white Ford pickup, she decided to pursue the Toyota pickup, as she felt that this was her suspect vehicle.

[9] After exiting the parking lot, she proceeded northbound, at which time she activated her emergency equipment. There are two lanes of traffic northbound at this location. She initially noted the vehicle in the left-hand lane, after which time it swerved or veered to the right and straddled the middle line for a period of time before moving back into the left-hand lane. The vehicle was moving slower than the posted speed limit. As the vehicle did not pull over, Cst. Jury activated her siren three times, after which the Toyota truck pulled over.

[10] The officer spoke to the driver and only occupant of the vehicle. She requested documents from him. She described a strong odour of beverage alcohol on his breath. She noted other signs of impairment, such as slow speech; some slurred speech - although she did not indicate which words or how many - heavy eyelids; and slow and deliberate movements.

[11] Cst. Jury ultimately arrested Mr. Turner for impaired operation of a motor vehicle and made a breath demand. She indicated that Mr. Turner initially said he was refusing to provide samples of his breath. She stated that he then changed his mind, indicating he would comply, but soon thereafter declined again to provide samples.

Analysis

Failure to disclose recording

[12] Defence seeks a judicial stay of proceedings, based on a breach of Mr. Turner's s. 7 *Charter* right with respect to a failure of police to disclose an audio and video recording from the in-vehicle WatchGuard recording system. This system captures video by way of cameras in the police vehicle which are both forward and backward facing. The forward facing camera captures the area in front of the vehicle. The backward facing camera focuses on the backseat of the police vehicle and has audio recording capacity. The video recording system is automatically activated when emergency lights of the police vehicle are switched on.

[13] In this case, the WatchGuard video and audio recording could not be located by police after the Crown made a request for it. Subsequently, a disclosure officer looked for but could not locate the recording. Approximately a year after the alleged charges, the investigating officer, with the assistance of other officers, located an electronic file for this recording on the office computer, but it was inoperable.

[14] The Crown has a duty 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 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).

[15] It is obvious that evidence may be unintentionally lost at times due to human error. The question to be answered in an application of this nature was stated by Sopinka J. in *La*:

> ... 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*. (para. 20)

[16] In order to properly determine whether there has been unacceptable negligence, the circumstances of the loss of 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).

[17] The *La* decision also noted that:

> 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. (para. 24)

(a) Relevance of the recording

[18] In the matter before me, the lost video and audio recording was clearly relevant, as it would have captured the manner of driving prior to Mr. Turner's vehicle being stopped. Additionally, the interactions between Cst. Jury and Mr. Turner from the time she approached his vehicle to the time they exited the police vehicle at the Arrest Processing Unit would have been captured by audio, by video, or by both audio and video.

(b) Whether there was a *Charter* breach

[19] The next issue to determine is whether there was a breach of Mr. Turner's s. 7 *Charter* right as a result of the loss of this recording.

[20] In my view, the Crown has not been able to demonstrate that the loss of evidence was not due to unacceptable negligence. In considering the circumstances with respect to the lost evidence, I am unable to say that reasonable steps were taken to preserve it. No effort was expended to transfer the video via the portable USB device that forms part of the WatchGuard system from the police vehicle to the office computer by the investigating officer.

[21] It is important to note that the lost evidence is highly relevant evidence. In fact, it may be said to be the best evidence. The Court in *La* stated:

> 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. (para. 21)

[22] Despite repeated requests by the Crown's office, the police made no real effort to attempt to locate the lost recording until soon before trial. This was approximately a year after the alleged charges arose. The investigating officer did not make attempts to preserve the evidence immediately upon her return to the detachment on the evening of the alleged offences. Instead, the USB device was left in the police vehicle for somebody else to look after.

[23] Although I appreciate that Cst. Jury had no training with respect to the system in question and did not foresee an issue with respect to the recording, the duty to preserve evidence is a high standard. In this case, the police fell short of that standard.

[24] As indicated, I have come to the conclusion that the Crown has not satisfactorily explained the loss of evidence in this matter. In all the circumstances, I find that it has not been established that the loss of the recording was not due to unacceptable negligence. Therefore, I find that there was a breach of Mr. Turner's s. 7 *Charter* right.

(c) What is the appropriate remedy?

[25] I next consider what the appropriate remedy should be. Is an appropriate and just remedy in these circumstances a judicial stay of proceedings or some less drastic remedy?

[26] The Crown argues that the loss of this evidence was inadvertent and accidental.

[27] In the context of drinking and driving cases, the destruction of videos has been considered in a *Charter* context by a number of courts with varying results.

[28] For example, in *R. v. Sharma*, 2014 ABPC 131, Fradsham J. 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 were 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. Madhdoori*, 2008 ONCJ 129, the defence brought a similar application with respect to a police detachment video recording in an impaired driving case. The video recording had been destroyed after a retention period elapsed. Even though the Court noted that due to its quality, the recording was of minimal relevance, the destruction of it amounted to unacceptable negligence. A stay of proceedings resulted.

[30] The decisions in *R. v. Leung*, 2008 ONCJ 110 and *R. v. Yu,* 2008 ONCJ 153, which were factually similar to the *Madhdoori* decision, led to the same result.

[31] Other courts have come to a different conclusion.

[32] For example, 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. ...

[33] In the following paragraph, 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. ...

[34] 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. Based on the evidence of Cst. Jury, the video recording captures events as they transpire. She also testified that the audio recording would have captured her interactions with Mr. Turner in the police vehicle.

[35] As earlier mentioned, the Crown and its agents have an obligation to preserve relevant evidence. The Crown has not offered a good explanation as to why that did not occur in this case. Neither on August 3, 2015, the night of the alleged offence, nor thereafter, did the investigating officer make any attempt to transfer the video and audio file from the police vehicle to the computer system in the detachment which housed these recordings.

[36] I should point out that it appears another officer made that transfer, although it is not clear when this occurred.

[37] It is clear that the Crown's office was prompt and diligent in asking the police to forward them the video and audio recording in this matter in order that it might be disclosed. Initially, the disclosure officer indicated to the Crown that the recording could not be located. Despite further requests from the Crown's office to the investigating officer and, on occasion, to both the investigating officer and the disclosure officer, there is no evidence that any further attempts were made to secure the recording until approximately a year after the alleged charges arose at a time very close to the start of Mr. Turner's trial.

[38] At that point, Cst. Jury received assistance from other officers and located the file named "traffic citation" on the detachment computer, which is what she had labelled this recording. At that time, Cst. Jury determined that the file could not be opened, even though the police did retrieve another recording from Cst. Jury's vehicle on the detachment computer from an earlier incident on the night in question.

[39] However, there is no indication that any computer technician attempted to determine whether the recording data for the file named "traffic citation" could be located on the police vehicle system, the portable USB device used to transfer files from the police vehicle to the office computer, or on the office computer itself.

[40] It is also important to note that Cst. Jury had no training with respect to the recording system. When asked whether she received training with respect to how the WatchGuard computer software operates, she stated, "No, I know very little about it."

And later in her testimony, she conceded, "There — it was a new system and no one — no one knew how to operate it well from the start."

[41] It is true that there is a societal interest in having criminal matters resolved through a trial process. However, public confidence in the administration of justice must also be preserved. The principle set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 is that a stay of proceedings is appropriate where it appears:

> ...that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. ... (para. 96)

[42] Cst. Jury testified that as time went on, the loss of these recordings was not an isolated incident and that the front-line officers had not received instruction as to how to use the system or as to steps to better preserve these recordings.

[43] Indeed, another file which Cst. Jury investigated apparently had the same issue. In *R. v. Lavallee*, 2016 YKTC 57, although Cozens J. was not asked to consider a *Charter* breach in remedy, he commented:

> I pause here to note that although the police vehicle was equipped with both video and audio-recording capability, the investigation video has been lost. Apparently this was not an isolated loss, and the same was true for recordings made by several other police vehicles. (para. 17)

[44] I should point out that the *Lavallee* investigation occurred on August 11, 2015, which is close in time to the investigation in the matter before me.

[45] I appreciate that this was a relatively new system that the police had had installed. However, the continued loss of relevant evidence is a concern which undoubtedly impacts negatively on public confidence in the administration of justice. It would have been prudent for the RCMP to have all preservation issues resolved with the new system before replacing the older video in-car system.

[46] I must also consider the lost evidence "in the context of the rest of the evidence" (*R. v. Bradford* (2001), 52 O.R. (3d) 257 (Ont. C.A.)).

[47] The importance of evidence of this nature in making full answer and defence cannot be overstated. In my view, the fact situation in this case demonstrates that very point. The video recording, which commenced upon the officer turning on her emergency equipment, would have been of assistance in a number of ways. The recording would have alleviated uncertainty with respect to Cst. Jury's evidence, for example, regarding Mr. Turner's driving pattern.

[48] The officer explained that she was unable to say how slowly the suspect vehicle was travelling before it pulled over. She admitted, however, that the video recording would have captured her vehicle speed as she followed Mr. Turner's vehicle if her radar were turned on.

[49] She also testified that the suspect vehicle veered or swerved partially into the right-hand lane of the two northbound lanes at some point while she was following it. In direct examination she stated that, "It continued straddling the line for several car lengths up the Two Mile Hill and eventually pulled back into the left-hand lane."

[50] In cross-examination, defence counsel questioned her with respect to how long the driver had straddled the line.

> Q All right. And do you — can you recall how long he remained in that position for, or would you just be guessing at this point?
> A Yeah, I don't recall specifics.
> Q All right. He was straddling the white line for a period of time and you can't tell us what it was?
> A Yes.

[51] In terms of the alleged refusal to provide a breath sample, Cst. Jury testified that while in her police vehicle, Mr. Turner initially refused; then changed his mind; and subsequently said that he did not want to deal with it now, and that he was not providing a sample.

[52] Defence counsel asked the officer:

> Q So when you say you set out the process, I asked a slightly different question and that was when he said, I don't want to deal with it right now, did you explain to him that 'right now' didn't mean that he had to provide a sample at that point in time? Did you tell him that?
> A I don't recall the exact conversation. I didn't make notes of every word spoken at the time.
> Q It would be on the video, though, right - because this took place in the police car?
> A Yes.
> Q Right. So all of that would have been recorded; correct?
> A Yes.

[53] The video and audio recording would have provided a level of accuracy that is not otherwise attainable in this fact situation. The officer agreed that it was a challenge generally to accurately record observations in notes in a reasonably contemporaneous

fashion. The recording would have allowed for a better testing and assessment of the officer's reliability and credibility. It would have documented events of which the officer has some limited recall, for example, the breath demand conversation between Cst. Jury and Mr. Turner in the police vehicle. It would have captured the amount of time Mr. Turner's vehicle straddled the line. It would have captured the slower speed that the officer said Mr. Turner's vehicle was travelling.

[54] In summary, there were a number of frailties in the evidence of the investigating officer. Questions raised by these shortcomings could have been answered by the video. As earlier indicated, it would have been the best evidence.

[55] In my view, there is a significant impairment of Mr. Turner's ability to make full answer and defence as a result of the loss of the recording due to the unexplained and unacceptable negligence of the police.

[56] I am also of the view that the evidence before me is a somewhat ambiguous record of what actually transpired at the time of the alleged offences. As a result, I do not believe that a fundamentally fair trial can be achieved in the absence of the recording.

[57] As outlined in *R. v. Carosella*, [1997] 1 S.C.R. 80, the degree of prejudice stemming from the *Charter* breach is relevant to the ultimate remedy.

[58] The trial unfairness occasioned by this breach of Mr. Turner's right to make full answer and defence is significant. I do not view a lesser remedy to a stay of proceedings, such as assessing Cst. Jury's reliability and credibility in light of the lost

evidence, as feasible in this matter (*R. v. Bero* (2000), 137 O.A.C. 336, at para. 54 and 56-67).

[59] As reinforced by the decision in *R. v. Buyck*, 2007 YKCA 11, I am cognizant of the fact that the onus is on Mr. Turner to demonstrate that the high threshold for a stay of proceedings is the only appropriate remedy. In all of the circumstances, I conclude that Mr. Turner has met this onus and that the only appropriate remedy on the facts of this case is a stay of proceedings.

[60] In the event that I am in error in ordering a judicial stay of proceedings, alternatively, I would have found as an appropriate remedy that the evidence of the investigating officer for the time period captured by the recording is inadmissible.

[61] I appreciate that this alternative remedy would lead to there being insufficient evidence to support reasonable grounds for the breath demand. As a result, I would rule the breath demand to be invalid, leading to a defence to the refusal charge. Also, there would be insufficient evidence to support the impaired driving charge. This remedy would therefore lead to an acquittal on both charges.

Other Arguments

[62] Lastly, if I am in error that there was a breach of Mr. Turner's s. 7 *Charter* right, I will consider the other arguments made regarding both the refusal and impaired driving charges.

Refusal to provide a sample

[63] In all the circumstances, the investigating officer arguably had reasonable grounds to make a breath demand of Mr. Turner.

[64] Case law has established that words of a refusal to provide a breath demand may be conditional, depending on the circumstances.

[65] For example, the decision in *R. v. Sullivan* (1991), 1 B.C.A.C. 312, recognizes that an accused who has invoked his right to counsel, while at the same time indicating that he will not provide breath samples, may still have the option of changing his mind after exercising his right to counsel.

[66] The more recent decision in *R. v. Bagherli*, 2014 MBCA 105, accepts this approach. Mainella J.A., having considered *R. v. Mandryk*, 2012 ONSC 3964 stated:

> ... As Code J. explained in *Mandryk*, an initial refusal accompanied by a request to speak to counsel may not, depending on all of the circumstances of the incident, be considered a definitive refusal for the purpose of making out the offence under s. 254(5) of the *Code* until the right to counsel is exhausted. I agree. (para. 41)

[67] In Mr. Turner's circumstances, there is a question as to whether he ever engaged his right to counsel. Instead of responding appropriately to Cst. Jury's question as to whether he wished to speak with a lawyer, Mr. Turner repeatedly complained about being confined in the police vehicle. It was only when he arrived at the Arrest Processing Unit that he demanded to speak to a lawyer.

[68] In any event, in the circumstances of this case, I do not have to make a definitive finding on this issue.

[69] Turning to the conversation between Cst. Jury and Mr. Turner about his providing breath samples, Mr. Turner displayed some ambivalence in terms of whether he would provide breath samples. The officer's evidence in this regard is not fulsome. She had a notation that he initially refused the breath demand; then changed his mind after having been explained the consequences of a refusal; and subsequently, indicated that he was not ready to provide a sample at that moment.

[70] Cst. Jury had no present recollection of Mr. Turner's change of heart after having been explained the consequences of a refusal. She accepted that he had said this based on her note to that effect. Her next note is that Mr. Turner was not prepared to provide a sample right now.

[71] Although Mr. Turner's last comment to the officer in this regard indicated he would not provide a sample at that moment, the officer had no recollection of explaining to Mr. Turner that the sample would not be taken roadside.

[72] Despite the ambivalence displayed by Mr. Turner in this regard, Cst. Jury did not take him to the detachment, where the breathalyser machine was located, but instead transported him to the Arrest Processing Unit which was not equipped with a breathalyser unit.

[73] In all the circumstances, I am unable to conclude that the Crown has discharged its burden in this regard.

[74] Mr. Turner is not guilty of the refusal charge.

Impaired operation of a motor vehicle

[75] In determining whether Mr. Turner's ability to drive as impaired, I am governed by the decision in *R. v. Stellato*, 1993 ONCA 3375, which considered the issue of proof of impairment affecting the ability to operate a motor vehicle. Labrosse J.A. stated:

> ... Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out. (para. 14)

[76] In the matter before me, as indicated above, there were arguably reasonable grounds for the breath demand. However, in my view, there was limited indicia of impairment and very little evidence of out-of-the-ordinary driving.

[77] In terms of indicia of impairment, for example, although some were noted, the officer also observed no issues with respect to Mr. Turner's balance or gait. He responded appropriately to questions except when he became agitated. Mr. Turner's delay in pulling over for the police is a factor to be considered but it does not tip the balance, especially in the absence of any evidence about why Mr. Turner did not pull over sooner.

[78] Having considered all of the evidence in this regard, when the limited indicia of impairment and the minimal evidence of poor driving is combined with the frailties in the

officer's evidence, I have concluded that there is insufficient evidence to prove beyond a reasonable doubt that Mr. Turner's ability to operate a motor vehicle was impaired by alcohol.

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CHISHOLM T.C.J.