Citation: *R. v. Winzer*, 2003 YKTC 58 Date: 20030702
Docket: T.C. 02-00752
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Lilles

R e g i n a

v.

Mary Ann Winzer

Appearances:
John Phelps Counsel for Crown
Leigh Gower Counsel for Defence

DECISION ON *VOIR DIRE*

[1] Mary Ann Winzer was charged with drinking and driving offences pursuant to ss. 253(a) and 253(b) as a result of an incident that occurred on March 22, 2003.

[2] The circumstances are straightforward. Constable Thalhofer was managing a four way stop intersect at Industrial Road and Quartz Road, here in the City of Whitehorse, Yukon, at 6:30 a.m. on March 22, 2003. A vehicle driven by the accused, Mary Ann Winzer, went through the intersection without coming to a full stop. When Constable Thalhofer pulled the vehicle over and spoke to the driver, he noticed the smell of alcoholic beverage coming from the vehicle. He asked the accused to step out and detected the odour of alcoholic beverage on her person. Ms. Winzer acknowledged that she had a drink or two, the last several hours earlier. Consequently, the Constable made a demand for a breath sample into a screening device. It registered a fail. A demand for breath samples was made and Ms. Winzer was transported to the detachment for that purpose.

[3] Although these facts are straightforward, in this case, they raise an important legal issue. The defendant has asked that I exclude the Certificate of Analysis as a result of the *Charter* breaches. The breaches are based on the Constable providing inadequate information to the accused with respect to her right and ability to access legal advice prior to providing the breath samples.

[4] When the defendant registered a "fail" on the screening device, the Constable gave Ms. Winzer the following *Charter* warning from memory. The accused was still in the back seat of the police vehicle. The Constable's exact words were transcribed from a video recording made by a video camera in the officer's car at 6:35 a.m.:

> Okay, because of the FAIL reading of the alcohol-screening device Mary, I want to advise you of a few things here, okay? I want to advise you that you are being detained for an investigation of impaired driving, and that you have a right to retain and instruct counsel without delay, and that means you can call a lawyer if you wish. If you cannot afford a lawyer, you can contact Legal Aid for free legal advice, or if you require some legal assistance you can obtain that through the Legal Aid Program free of charge, and you'll have the opportunity to make a phone call when we get back to the detachment. Do you understand all your rights? Just hang on a second….

[5] The officer recorded her response as follows:

> Yeah, so do I have to leave the vehicle here?

[6] Later at the detachment, at 6:51 a.m., he again advised her of her right to counsel in the following words:

> Ok Mary Ann, would you like to call a lawyer or Legal Aid or anything at all like that? No? Okay, well just have a seat in here on the black chair there; I'll just swing it around so we can talk a little easier. Just let me swing it around this way here, (sound of chair moving) there we go. Uhh, so you understand that it doesn't cost anything to talk to a lawyer, anything like that? Okay. Your (sic)

> waiving your right to contact counsel? No, I'm just asking, I just want to make sure you understand."

[7] If Ms. Winzer said anything in response to the officer, it was not audible on the videotape. The Constable did not read the *Charter* advice from a card, even though he had it with him. In court, the Constable produced a copy of the card which contains the current *Charter* warning. It is instructive to compare its wording with what Constable Thalhofer told the accused:

> **CHARTER OF RIGHTS**
>
> You are under arrest for…(ordinary language). You have the right to retain and instruct counsel without delay. You may call any lawyer you want to get immediate legal advice. Legal Aid duty counsel is available at any time, including nights and weekends, to provide you with free legal advice. You may speak to a lawyer in private, at the detachment [*or if appropriate, eg. at the hospital*], without the police being present. In addition to free immediate legal advice by telephone, you have the right to apply to Yukon Legal Aid for free legal assistance.
>
> Do you understand?
>
> Do you want access to a telephone and the number to speak to a lawyer?

[8] One further matter needs to be emphasized. When advised by the officer at the scene that she had registered a fail on the screening device, Ms. Winzer became emotionally upset. She began to cry and continued to do so until after she provided the breath samples at the detachment. The video of her at the detachment shows her repeatedly rubbing the tears from her eyes. When dealing with an emotionally upset or distraught defendant, as in this case, there is a greater obligation on the officer to explain that person's *Charter* rights.

The Law

[9] The purpose of s. 10(b) of the *Charter* is set out in *R. v. Bartle*, [1994] 3 S.C.R. 173:

> The purpose of the right to counsel guaranteed by s. 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations: R. v. Manninen, [1987] 1 S.C.R. 1233, at pp. 1242-43. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him – or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: Brydges, at p. 206; R. v. Hebert, [1990] 2 S.C.R. 151, at pp. 176-77; and Prosper. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in Clarkson v. The Queen, [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.

[10] When arrested or detained for the purpose of taking breath samples pursuant to s. 254(3) of the *Criminal Code*, the police officer must comply with the informational duty under s. 10(b) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel. Moreover, *Bartle, supra,* requires the information provided to be (at para. 21):

- Comprehensive in scope;
- Presented in a timely manner; and
- Comprehensible to the detainee.

[11] While the first two matters are primarily objective criteria, the last one has an important subjective component. Factors that can impact on the detainee's

comprehension of the information provided include age, language, cognitive disabilities and, as in this case, emotional state.

[12] In this case, the accused was faced with a demand for breath samples in a suspected drinking and driving charge. Non-compliance with the demand can have serious consequences. Compliance will involve providing conscriptive and possibly incriminating evidence to the police. A person faced with such a decision should be fully and clearly advised of available services before being expected to assert the right to counsel under s. 10(b). As *Bartle, supra,* points out, subsequent duties on the state to actually provide and facilitate access to counsel and to curtail questioning or the taking of the breath samples are not triggered until and unless the detainee expresses a desire to contact legal counsel. It follows that the *Charter* advice given by the police must be both comprehensive and comprehensible if the detainee is to make a meaningful choice. A person who does not understand his or her right cannot be expected to assert it. A mere recitation of those rights may not be sufficient.

[13] The same conclusion is reached by considering when and how an accused can waive a substantive right such as the s. 10(b) *Charter* right. The courts have been consistent in stating that before an accused can be said to have waived his or her right to counsel, he or she must be possessed of sufficient information to allow him or her to make an informed choice as regards to exercising that right. A person who waives the right to be informed of something, without knowing what it was that he or she had the right to be informed of, can hardly be said to be possessed of full knowledge of those rights.

[14] The Supreme Court of Canada in *Bartle, supra,* has emphasized that the standard for waiver of the informational right will be high (para. 41):

> In light of the component's importance in ensuring that the purposes of s. 10(b) are fully realized, the validity of waivers of the informational component should only be recognized in cases where

> it is clear that the detainee already fully understands his or her s. 10(b) rights, fully understands the means by which they can be exercised, and adverts to those rights. Requiring that these conditions be met ensures that any subsequent waiver of the right to counsel made following a waiver of the informational component will be a fully informed one. Since the informational obligations s. 10(b) imposes on state authorities are not onerous, it is not unreasonable, in my view, to insist that these authorities resolve any uncertainty that might exist regarding the detainees knowledge of his or her rights, something they can do by simply reading the standard caution, as they are required to do in cases where the detainee does not clearly and unequivocally indicate the desire to waive the informational component.

[15] The standard *Charter* warning referred to above and carried by police while on duty, has been carefully drafted to reflect almost twenty years of constitutional jurisprudence. It should not be deviated from lightly, and any significant deviation will invariably result in close judicial scrutiny.

Conclusion

[16] It is important to consider the information provided to Ms. Winzer by Constable Thalhofer in its entirety, not as individual words or phrases. The circumstances, including the defendant's emotional condition are relevant considerations. The evidence of her responses to the officer will be very important in appreciating whether she understood her rights in this case, and whether she waived them. Finally, it is trite law that the onus of establishing an informed waiver rests with the Crown.

[17] I find, in all of the circumstances, that there has been a breach of the accused's *Charter* rights. In my opinion, the informational component of the *Charter* advice given to the accused was deficient.

[18] Where, as in this case, the detention occurs in the early morning before the beginning of normal business hours, it is important to emphasize (as the

standard warning does) that duty counsel is available at any time, 24 hours a day, including nights and weekends. A lay person, unfamiliar with the procedures put into place subsequent to the Supreme Court of Canada decision in *R. v. Brydges*, [1990] 1 S.C.R. 190 may not appreciate this fact. He or she may presume that contacting a lawyer at that time in the morning would be difficult or a great inconvenience.

[19] The information given by Constable Thalhofer did not include the opportunity to speak to counsel in private. The right to privacy is inherent in the right to counsel as guaranteed by s. 10(b). That fact should be communicated to the detainee in the informational component. A person may wish to speak to counsel in private but decline the opportunity to do so believing that a police officer will be present during the conversation. At the scene, Constable Thalhofer told Ms. Winzer that she could make a phone call when they got back to the detachment. When they got back to the detachment, the Constable placed Ms. Winzer at a small table in the breathalyzer room and sat himself down in front of her. The Constable then (again) spoke to Ms. Winzer about talking to a lawyer, without any indication that it would be done in private. In these circumstances, a reasonable person who is unaware of his or her rights could and probably would assume that the call would be made from that room with the officer present.

[20] Justice system officials, including judges, are sometimes rightly criticized for using technical jargon that lay people do not understand. This case illustrates that there is a danger in too much informality and in using simple words that do not fully convey the required constitutional message. Perhaps in an attempt to soothe or calm the emotionally upset Ms. Winzer, Constable Thalhofer used language in advising her of her *Charter* rights that was oversimplified and conveyed an unintended message that what he was telling Ms. Winzer wasn't very important. The Constable never put the question to Ms. Winzer directly and appeared not to give Ms. Winzer an opportunity to respond. Reading from the card, using it's carefully drafted language and format, would have conveyed the

complete and accurate information as well as the importance of the information provided.

[21] Further, based on all of the circumstances, including the emotional condition of Ms. Winzer as described by the officer, the Crown has not satisfied me that the accused waived her s. 10(b) *Charter* rights. After the advice given in the patrol car at the scene around 6:35 a.m., the officer asked, “Do you understand all your rights?” Before she could answer, he interrupted her saying, “Just hang on a second…”. He then recorded her response as follows: “Yeah, so do I leave the vehicle here”. In my opinion, that response was not obviously responsive to the question posed by the officer. Objectively, I am not satisfied that she understood the advice given.

[22] At the detachment, after 6:51 a.m., the officer again spoke to Ms. Winzer about contacting a lawyer (see above). The transcript of the dialogue from the video recording does not show that Ms. Winzer said anything. The video recording did not pick up any responses from Ms. Winzer. Constable Thalhofer made no notes of her responses, if any. His dialogue is one sided, “Okay. Your (sic) waiving your right to contact counsel? No, I’m just asking, I just want to make sure you understand”. Considering this dialogue and the absence of notes as to what she said, I am not satisfied that Ms. Winzer waived her s. 10(b) *Charter* rights.

[23] In contrast, the *Charter* advice on Constable Thalhofer’s card asks specific questions which demand specific answers from the accused:

> Do you understand?
> Do you want access to a telephone and the number to speak to a lawyer?

[24] These questions invite clear answers that can be evaluated objectively.

[25] Although Constable Thalhofer did not record Ms. Winzer's response in his notes, he did indicate on his report to Crown Counsel that Ms. Winzer had said, "Yeah" in response to being given the *Charter* advice and whether she understood. The Constable does not recall Ms. Winzer's exact words in declining counsel, but testified that she did. The importance of recording the exact words used by the accused in waiving a substantial *Charter* right cannot be overemphasized. Without these words, the court will be unable to objectively evaluate whether the waiver was valid. It also minimizes the likelihood of mistakes, or confusion between what the officer normally does and what he did in this particular case. During the trial, such an error was brought to my attention. On the Report to Crown Counsel, Constable Thalhofer had checked off that he had given Ms. Winzer the police warning and that the accused had indicated that she had understood. Upon reviewing the tape prior to court, Constable Thalhofer realized that he had made a mistake, that he had not warned Ms. Winzer and that he had incorrectly reported that he had. This underscores the importance of taking detailed notes of what was said by the accused when waiving substantial rights, like the *Charter* right to counsel.

[26] The *Bartle, supra,* decision dealt exhaustively with the issue whether the Certificate of Analysis should be excluded in these circumstances. It concluded that the Crown should bear the legal burden of establishing, on the evidence, that accused would not have acted any differently had his s. 10(b) rights been fully respected. It is clearly not an easy burden to meet.

[27] For the same reasons enunciated by the Supreme Court of Canada in *Bartle, supra,* as applied to the circumstances of this case, I am satisfied that the Certificate of Analysis should be excluded pursuant to s. 24(2) of the *Charter*. It is incriminating evidence obtained in the context of the infringement of the accused's s. 10(b) *Charter* rights. Although there is no issue regarding the "good faith" of the officer, this fact cannot cure the fact that admission would render the trial unfair. Circumstances beyond the officer's control did not intervene to

prevent the officer from advising Ms. Winzer properly (the officer had a card with the proper *Charter* advice on his person, but chose not to use it).

[28] Of course, it is trite to observe that drinking and driving is a serious offence that is the cause of great damage to property and persons in Canada. Nevertheless, the principle of adjudicative fairness and the long-term interests of the administration of justice mandate that the Certificate of Analysis be excluded in this case.

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Lilles C.J.T.C.