SUPREME COURT OF YUKON

Citation: *R v Vaillancourt*, 2024 YKSC 2

Date: 20240116
S.C. No. 23-AP003
Registry: Whitehorse

BETWEEN:

REX

APPELLANT

AND

RYAN ALLEN VAILLANCOURT

RESPONDENT

Before Justice K. Wenckebach

Counsel for the Appellant — Mark Friedman

Counsel for the Respondent — Jennifer Budgell

REASONS FOR DECISION

Overview

[1] The respondent, Ryan Vaillancourt, was charged with impaired driving, contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*"). At trial, the Crown sought to introduce the results of breath samples that were taken from him. Mr. Vaillancourt challenged their admissibility on the basis that the police had violated his right to counsel under s. 10(b) of the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the "*Charter*") by not giving him a reasonable opportunity to contact counsel.

[2] The circumstances of the arrest are that the police stopped Mr. Vaillancourt's van on December 2, 2021, at approximately 2:30 a.m. He obtained a "fail" on an approved screening device and was arrested. The police officer, Constable Cook, then informed him of his right to obtain counsel. Once at the police station, Constable Cook provided Mr. Vaillancourt with the website from the Law Society of Yukon, which lists all lawyers who are called to the bar in the Yukon. Mr. Vaillancourt randomly picked a lawyer, Sarah Bird, to contact.

[3] Starting at about 3:00 a.m., Constable Cook tried to contact Ms. Bird by phoning three different phone numbers five times, leaving voice mail messages three times. At the last phone number Constable Cook tried, the voice mail message stated that Ms. Bird was out of the office between September and January. About twenty minutes had passed by the time Constable Cook placed the last phone call.

[4] After the last phone call, Constable Cook spoke to Mr. Vaillancourt about his efforts to reach Ms. Bird. He told Mr. Vaillancourt that he had tried to get a hold of Ms. Bird at several phone numbers without success. He did not tell him that she was out of the office between September and January. He asked Mr. Vaillancourt if he wanted to speak with another lawyer or Legal Aid, and that they were going to start the "process". Mr. Vaillancourt stated he did not want to try another lawyer and wanted to speak with Ms. Bird before they got "too far into the process". After discussion between Constable Parent, who was a police officer assisting Constable Cook, and Mr. Vaillancourt about contacting counsel, Constable Cook began the period of observation. Ms. Bird did not call, and Mr. Vaillancourt did not choose to speak to another lawyer. About 30 minutes later, after completing the period of observation, the police took Mr. Vaillancourt's breath sample.

Trial Judge's Decision

[5] The trial judge determined that the police had violated Mr. Vaillancourt's right to counsel because they did not give him a reasonable opportunity to contact counsel. The trial judge also determined that, pursuant to s. 24(2) of the *Charter*, the evidence of the results of the breath test should be excluded.

[6] The Crown's case was dependent on the results of the breath test. Mr. Vaillancourt was therefore acquitted.

Appeal

[7] The Crown appeals the trial judge's ruling. For the reasons below, I conclude that, although the police violated Mr. Vaillancourt's right to counsel under s. 10(b) of the *Charter*, the evidence should not be excluded under s. 24(2). I therefore allow the Crown's appeal.

Issues

[8] The trial judge's findings of fact are uncontroverted. The parties agree that the standard of review is correctness. The issues are, therefore:

(A) Did the trial judge err in concluding that the police did not provide Mr. Vaillancourt a reasonable opportunity to speak with counsel? and

If there was a s. 10(b) *Charter* violation:

(B) Should the results of the breath test be excluded pursuant to s. 24(2) of the *Charter*?

Analysis

(A) Did the trial judge err in concluding that the police did not provide Mr. Vaillancourt a reasonable opportunity to speak with counsel?

[9] The trial judge was correct in concluding that the police did not give Mr. Vaillancourt a reasonable opportunity to contact counsel.

[10] Under s. 10(b) of the *Charter*, a detainee has the right to consult a lawyer. The police have a corresponding responsibility to assist the detainee in contacting counsel. The police have three duties: they must inform the detainee of their right to counsel; provide the detainee with a reasonable opportunity to exercise that right; and refrain from eliciting evidence until the detainee has had the opportunity to contact counsel (*R v Sinclair*, 2010 SCC 35 at para. 27).

[11] The detainee, for their part, is entitled to speak to counsel of choice. However, they also have the obligation to exercise reasonable diligence in contacting counsel. Where counsel of choice is not available within a reasonable time, they are expected to speak with another lawyer. If they do not, the police duty to hold off in questioning them is suspended (*R v McCrimmon*, 2010 SCC 36 at paras. 17-18).

[12] In the case at bar, the police officer took the responsibility of contacting counsel for Mr. Vaillancourt. There has been some discussion in the case law about the standard for police when it takes control of communication with counsel. Some courts have stated that the police are required to do what the detainee, themselves, would have done (*R v Maciel*, 2016 ONCJ 563 at para. 43). Others, however, have stated that the police must take “all steps that were reasonable in the circumstances” (*R v Wijesuriya*, 2020 ONSC 253 at para. 72, quoting *R v O’Shea*, 2019 ONSC 1514 at para. 22).

[13] In *Wijesuriya*, the court gave two reasons for rejecting a standard in which police actions are assessed against what the detainee would have done. First, the standard requires a hindsight analysis. The court stated:

> [66]…This will often leave the court to speculate on what might have been done. Hindsight at a *voir dire*, months or years later, would likely raise other possibilities of what might or could have been done which were neither contemplated, reasonable nor would necessarily have assisted to contact counsel. … [emphasis in original]

The judge also stated that the hindsight analysis could lead to speculation (at para. 67).

[14] Second, the court noted that determining what the detainee would have done engages a subjective standard. The obligation on the police would therefore be amorphous and could not be assessed or implemented with certainty during the detention (at para. 71).

[15] I agree and adopt the reasoning in *Wijesuriya*. Where the police take control of contacting counsel rather than permitting the detainee to do so themselves, the police have the obligation to take all reasonable steps to contact counsel. The determination of what constitutes reasonable steps is fact specific.

[16] The trial judge also applied the reasonable steps standard. He found that, overall, the police took reasonable steps to try to reach Mr. Vaillancourt's counsel of choice. However, he concluded that they did not fulfill their duties in two ways. First, after they heard Ms. Bird's out of office message, they should have told Mr. Vaillancourt that Ms. Bird was out of office for a significant period of time. Second, the police were required to tell Mr. Vaillancourt the amount of time he had to speak with counsel; and, after that point, even if he did not speak with any counsel, they would obtain breath samples from him. However, they did not give him this information. The police, therefore, did not provide Mr. Vaillancourt with a reasonable opportunity to speak to counsel.

[17] I will consider each of these conclusions.

Information that Counsel of Choice was Out of Office

[18] I agree with the trial judge that the police were obligated to tell Mr. Vaillancourt that Ms. Bird was out of office for a significant period of time.

[19] In my opinion, where counsel is not immediately available, the determination of whether the police took all reasonable steps includes not only assessing the police's actions in trying to reach counsel and but also assessing the information the police gave the detainee about those attempts and counsel's availability. Communication about the police's attempts to contact counsel, and the outcome, is essential. Without it, the detainee cannot make a fully informed decision about how to exercise their rights to counsel.

[20] Crown counsel submits that the police were not obligated to tell Mr. Vaillancourt that Ms. Bird was out of office for four months because, reasonably, that information was not necessary for Mr. Vaillancourt to understand the situation. He argues that, by the time the police took the breath sample, 40 minutes had passed since they had last left a message on Ms. Bird's voice mail. They had left three voice mail messages for her, and it was almost 4:00 a.m. Any reasonable person would conclude on that basis alone that their counsel of choice would not be calling back. Knowing that Ms. Bird was out of office was not necessary to realize that he should try to contact another lawyer. That Mr. Vaillancourt did not speak with counsel before the police took his breath sample is not, therefore, because of the police's actions, but because Mr. Vaillancourt was not diligent in exercising his rights to counsel.

[21] Defence counsel submits that the issue is about the police's actions, and not what Mr. Vaillancourt would have done with the information. Moreover, Constable Cook, through his conversation with Mr. Vaillancourt, gave Mr. Vaillancourt the impression that

Ms. Bird may call back. Because the police did not tell Mr. Vaillancourt that Ms. Bird was out of office, then implied that Ms. Bird could phone back, Mr. Vaillancourt reasonably held out hope that she may call.

[22] In my opinion, the Crown is focussing on the wrong question. The assessment is about whether the police took all reasonable steps when facilitating the detainee's contact with counsel. While the detainee is also required to be diligent in contacting counsel, often, their ability to do so is contingent on the police fulfilling their duty. Therefore, it is generally only where the police have taken all reasonable steps that the detainee's diligence is examined. Here then, the first question must be whether the police should have told Mr. Vaillancourt that Ms. Bird was out of office as part of their duty to facilitate his contact with counsel.

[23] Where a police officer has taken responsibility for contacting counsel on behalf of a detainee, at the very least, the police officer should give the detainee all the important details of their attempts to contact counsel, including information that would indicate whether counsel would be available in a reasonable amount of time.

[24] It is not enough for the police officer to provide sufficient information about what they have done to contact counsel so that the detainee can decide what next steps to take. Permitting the police to provide partial information creates the risk that they will not tell the detainee all they should know. Moreover, if the question is whether the police have given sufficient information rather than all pertinent information, then, as happened here, the focus shifts from the police's actions to the detainee's response.

[25] Applying the proper focus here, the police learned that Ms. Bird was out of office for a total of four months and would not be returning to the office until January. The information was of a different nature than the fact that the police had left messages at

several different phone numbers. It was necessary for the police to give Mr. Vaillancourt this information. In failing to do so, they also failed to take all reasonable steps to facilitate Mr. Vaillancourt's contact with counsel.

Providing a Timeline and Informing Mr. Vaillancourt of the Police's Next Steps

[26] I conclude that the trial judge erred when he concluded that the police were required to give Mr. Vaillancourt a timeline in which he was expected to speak with a lawyer, and that the police would then proceed with obtaining breath samples even if he had not spoken with a lawyer.

[27] First, to the extent that the trial judge concluded that there is a general requirement on the police to provide this information to a detainee, I do not agree. There is no case law that establishes such a requirement. Injecting this as an extra requirement, in my opinion, adds unnecessary complication without providing benefit.

[28] Some courts have determined that, after waiting a reasonable period of time, police are required to advise a detainee that their lawyer has not called and should ask the detainee if they wish to speak with another lawyer (*R v Kerr*, 2023 ONSC 3638 at para. 35). Other courts, however, have decided that making this mandatory would be inconsistent with the Supreme Court of Canada's direction that the reasonable steps required depend on the context of the case (*R v Wilson*, 2016 ONCJ 25 at para. 34).

[29] I agree with this reasoning. The determination of whether the police have taken reasonable steps is highly fact specific. What is necessary in one instance will not be in another. I conclude that there is no general requirement that the police provide a time limit to a detainee to contact counsel, or that they advise the detainee that they are expected to contact counsel, and that the police will proceed with eliciting evidence from them even if they do not.

[30] I also conclude that, in this situation, other than their failure to tell Mr. Vaillancourt that Ms. Bird was out of office, the police provided Mr. Vaillancourt with all the information he needed to contact counsel. The kind of warning the trial judge proposed was not necessary for the police to fulfil their duty to provide Mr. Vaillancourt with the reasonable opportunity to contact counsel.

[31] Before Mr. Vaillancourt's breath samples were taken, Constable Cook and Constable Parent told Mr. Vaillancourt about roughly what the next steps would be, when they would occur, and what Mr. Vaillancourt's choices were. This is borne out by the recording of the police's interactions with Mr. Vaillancourt when they discussed contacting counsel.

[32] Immediately after Constable Cook left the first message on Ms. Bird's voice mail, he told Mr. Vaillancourt: "So, I'll wait 10 minutes, if she doesn't call back, I'll call again [if] she doesn't call back, I will have to ask you if you would like to choose a different lawyer."

[33] After making several phone calls to try to reach Ms. Bird, Constable Cook spoke to Mr. Vaillancourt:

> Q: Hey, Ryan, I left a few messages for Sarah, I think there were three different numbers I had to call, she hasn't called back yet, so we'll get started. Do you want to speak to a different lawyer?
> A: No, she's fine.
> Q: She's fine? OK, we'll get started with the process, and if she calls at anytime during that, I'll get you set up with that call, OK? That sound good?
> A: Yeah, as long as I can speak to her, yeah. Before we get too far into this.
> Q: Honestly, I understand where you're coming from, but it really depends on when she calls back. They're supposed to answer when we call them but it all depends on when she calls back, but we have to get started with the process.

A: That's the lawyer I picked, so that's the one I wanna talk to.
Q: If you want to pick a different one, you can.
A: No, she's fine.
Q: OK.

…

Q2 (Cst. Parent): You wanted to talk to Sarah Bird, right?
A: Yeah.
Q2: …but it has to be a lawyer of your choice. I can't make you change your mind. It seems like she's not phoning back. Do you want to try a different one? We can phone a different one, or you can call legal aid as well. We can give you a phone book, it's right here…if you want to try a different lawyer.
A: Well, that's the lawyer I picked like you went through your phone…
Q2: We tried two different numbers
Q [Cst. Cook]: Three.
Q2: We tried three, yeah…Ultimately it's up to you, but we can't wait for her to call back forever, right? So.
A: No, I understand but do you want me to pick and choose until we find a lawyer, or?
Q2: No, I mean, if you want to talk with her, like, I can't force you to call a different lawyer, does that make sense?
A: No, 100%, but I was forced to find a lawyer, I picked her, you guys can't get a hold of her, so… how is that my fault?
Q2: It's not your fault, but if you want to look and try another one, you can.
A: No, I'll stay with her.

[34] Thus, during those discussions, the police officers: gave a timeline to Mr. Vaillancourt for when the police officer would be calling Ms. Bird back but warned that, if he was unsuccessful in contacting her he would ask Mr. Vaillancourt if he would like to choose a different lawyer; and later told him that he phoned Ms. Bird at three different telephone numbers, told him twice that they would be getting the "process" started and that they could not wait forever, and asked several times if Mr. Vaillancourt wanted to speak with another lawyer or Legal Aid.

[35] As the case law suggests, the police officers told Mr. Vaillancourt that Ms. Bird had not called back and asked whether he wanted to speak to another lawyer.

[36] Moreover, their statements come close to the trial judge's own recommendations of what the police should do. They gave a rough outline about what they would do, when, and then the choices Mr. Vaillancourt would have; and the police told him that they would be starting with the process as well as asking him if wanted to speak with another lawyer.

[37] The trial judge found that Mr. Vaillancourt was confused by the process of seeking legal assistance, but that he did want to speak with a lawyer. It is tempting, then, to try to determine what could have been done differently. The trial judge did not find that the police caused or contributed to Mr. Vaillancourt's confusion. Because Mr. Vaillancourt did not testify, it would be speculative to consider what the police could have said that would have prompted Mr. Vaillancourt to agree to speak to another lawyer.

[38] Possibly, the police officers could have been clearer. They could have, for instance, identified that they would be taking breath samples, rather than using vague words such as "process". They could also have explained the steps all at one time. Again, however, there is no evidence that Mr. Vaillancourt did not understand that the police would be eliciting evidence from him, or that it would occur even if he did not speak with counsel. More importantly, the police are not expected to act perfectly; they are expected to act reasonably. Given the circumstances, I conclude that, aside from not telling Mr. Vaillancourt about Ms. Bird's out of office message, the police took all reasonable steps to facilitate Mr. Vaillancourt's contact with counsel.

[39] In the end, therefore, while I do not fully agree with the trial judge in his reasons, I find he was correct in determining that the police violated Mr. Vaillancourt's rights under s. 10(b) by not providing him with a reasonable opportunity to consult counsel.

B. Should the results of the breath test be excluded pursuant to s. 24(2) of the *Charter*?

[40] Because my conclusions about the violations of Mr. Vaillancourt's s. 10(b) *Charter* rights are different than those of the trial judge, I will conduct my own analysis about whether the results of the breath test should be excluded.

[41] I conclude that the results of the breath test should not be excluded.

[42] Pursuant to s. 24(2) of the *Charter*, evidence obtained through a *Charter* violation will be excluded where its admission would bring the administration of justice into disrepute. The three factors used to determine whether evidence should be excluded are: the seriousness of the conduct that violates the *Charter*; the impact of the breach on the *Charter*-protected interests of the accused; and society's interest in the adjudication of the case on its merits (*R v Grant*, 2009 SCC 32 at para. 71).

Seriousness of the Violation

[43] This factor addresses the gravity of the offending conduct (*Grant* at para. 73). In this case the violation was at the lower end of the spectrum. Although the police officers failed to tell Mr. Vaillancourt that Ms. Bird was out of office, they were otherwise clear in the information they gave him about their attempts to contact Ms. Bird. Mr. Vaillancourt was in the same room as Constable Cook and Constable Parent, and about 3 metres away from them, when Constable Cook told Constable Parent that Ms. Bird was out of office. This indicates that they were not hiding the information from him, or wilfully holding it back.

[44] Defence counsel submits that, after learning that Ms. Bird was out of office, the police officers continued to imply that she might call back. This both increased Mr. Vaillancourt's confusion and gave him unwarranted hope that she would call. The trial judge, however, did not find that this occurred. I also note that Constable Parent told Mr. Vaillancourt that it did not appear that Ms. Bird was phoning back. He then offered Mr. Vaillancourt the opportunity to phone someone else, which Mr. Vaillancourt declined. The police did, therefore, suggest that he could not depend on Ms. Bird to call back.

[45] Additionally, the police were otherwise *Charter* compliant in facilitating Mr. Vaillancourt's contact with counsel: they made sufficient efforts to contact Ms. Bird, informed him of Legal Aid, and mentioned the possibility of contacting either Legal Aid or alternative counsel several times. At the same time, they did not push Mr. Vaillancourt towards other counsel. I conclude that the error was inadvertent.

[46] There is one caveat, however. The trial judge found that Constable Cook's decision to obtain breath samples from Mr. Vaillancourt was because of his concerns about the impact the passage of time would have on the reliability of the breath samples, and not because Mr. Vaillancourt was not being diligent in pursuing legal counsel, or that a reasonable time for him to contact counsel had passed. The law on s. 10(b) is long-standing. Police should be alive to all a detainee's legal interests. The evidence here is that the police officer was not sufficiently cognizant of the s. 10(b) considerations. This therefore makes the breach more serious than it otherwise would be.

[47] Even with this caveat, however, given the other factors, I conclude that the violation is not serious.

Impact on Mr. Vaillancourt

[48] The impact of the breach on the accused involves assessing the extent to which the breach actually undermined the accused's interests (*Grant* at para. 76). I conclude that the impact on Mr. Vaillancourt was low.

[49] On the one hand, Mr. Vaillancourt would have benefited from speaking with a lawyer. Counsel could have provided him with information about the legal process. Moreover, Mr. Vaillancourt was confused about at least some aspects of the arrest: a lawyer could have eased some of that confusion and possibly lessened his stress.

[50] However, I cannot conclude that Mr. Vaillancourt would have spoken with counsel had the police told him that Ms. Bird was out of office. The police had called three different numbers and left three voice mail messages. They did this in the early hours of the morning, when offices are closed. A reasonable person would conclude, as Constable Parent suggested to Mr. Vaillancourt, that Ms. Bird would not be calling back. There is, moreover, no evidence that had Mr. Vaillancourt known Ms. Bird was out of office he would have sought advice from another lawyer. The police's failure did not have a tangible impact on the outcome. The impact on Mr. Vaillancourt was more than negligible but was not high.

Society's Interest in an Adjudication on the Merits

[51] In determining this factor, the court may address: the reliability of the evidence, the importance of the evidence to the prosecution's case and the seriousness of the offence at issue (*Grant* at paras 81-84).

[52] The breath test evidence is extremely reliable. In addition, the evidence was essential to the Crown's case: without it, Mr. Vaillancourt was acquitted. Drinking and

driving offences are also serious. There is a strong societal interest in adjudicating these offences on their merits.

[53] Moreover, generally, where the first two factors suggest inclusion, this factor will also indicate that the evidence should not be excluded (*R v Le*, 2019 SCC 34 at para. 142). This is true in this case, as well.

[54] As all the factors suggest that the evidence should not be excluded, I conclude that the evidence of the breath test would not bring the administration of justice into disrepute.

Conclusion

[55] I allow the Crown's appeal and set aside the acquittal.

[56] The Crown is also seeking that the Court enter a conviction. It is also seeking that this Court sentence the accused rather than remitting the matter to the Territorial Court of Yukon, as the Crown is seeking the minimum sentence.

[57] I will give defence counsel the opportunity to provide submissions about whether this Court should enter a conviction and sentence Mr. Vaillancourt. If defence counsel requires more than two weeks from the date this decision is issued to provide submissions, she should seek a case management conference to discuss filing deadlines.

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WENCKEBACH J.