Citation: *R. v. Charlie*, 2020 YKTC 26

Date: 20201007
Docket: 19-11014
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

BRUCE GORDON CHARLIE

Appearances:
Leo Lane — Counsel for the Crown
Malcolm E.J. Campbell — Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Bruce Charlie has pleaded not guilty to a single count of failing or refusing to provide a suitable sample of his breath pursuant to a valid demand on June 30, 2019, contrary to s. 320.15(1) of the *Criminal Code*. Counsel for Mr. Charlie has advanced three arguments in favour of acquittal, although, I would note that the first and second arguments, while alluded to by defence counsel, were not strenuously argued.

[2] The three issues are:

1. Was the traffic stop lawful;

2. Was the officer required to offer Mr. Charlie another opportunity to blow after he made him aware of the legal consequences of a refusal; and

3. Did Mr. Charlie have a reasonable excuse for failing or refusing to provide a breath sample on the basis he was incapable of so doing despite his best efforts.

[3] Defence has raised no issue with respect to validity of the demand under s. 320.27(1)(b).

Traffic Stop

[4] Dealing firstly with the validity of the traffic stop, the evidence indicates Cst. Tower was on patrol with Cst. Perry in Dawson City, Yukon, on June 30, 2019. Shortly before 3:00 a.m., he observed a silver Chevy Impala travelling on Front Street at a high rate of speed. He followed the vehicle and initiated a traffic stop, as observed in the WatchGuard video filed as exhibit 1 in these proceedings. The evidence with respect to the vehicle speeding was led by the Crown in direct and agreed to by Cst. Tower. Defence raised no objection.

[5] Later on in cross-examination, Cst. Tower agreed that his reason for pulling Mr. Charlie over, as stated on the WatchGuard video, was that Mr. Charlie's vehicle had hit the side of the road and thrown up some dust. Cst. Tower agreed that he did not actually see the vehicle go off the road; he saw the taillights in the distance and the dust cloud. Mr. Charlie's vehicle was the only one in the vicinity that could have caused the

dust cloud. Cst. Tower indicated that the dust cloud was clearer in person than is seen on the WatchGuard video, and disagreed that there was dirt on the road itself that could have caused the dust cloud. There were no other issues observed in relation to Mr. Charlie's driving.

[6] The starting point in assessing the validity of the stop is s. 106 of the *Motor Vehicles Act*, RSY 2002, c.153, which reads:

> Every driver shall, on being signalled or requested to stop by a peace officer in uniform, immediately
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> (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. S.Y. 2002, c. 153, s. 106

[7] In *R. v. Rowat*, 2018 YKSC 50, Gower J. of the Yukon Supreme Court, considered s. 106 and noted at paragraph 14:

> This section is similar to legislation in other provinces which has been interpreted by the Supreme Court of Canada as authorizing arbitrary detentions of motorists for purposes legitimately connected to highway safety concerns. The arbitrary detentions generally occur in the context of organized police check stops or random patrols by roving police vehicles. The Supreme Court has said repeatedly that the stops are justified under s. 1 of the *Charter* because they help to ameliorate the pressing and substantial problem of death and destruction on our highways. …

[8] Justice Gower notes, at paragraphs 16 and 17, that the authority to make such arbitrary traffic stops is limited by precluding stops made in a discriminatory manner or stops made to further a criminal investigation unrelated to traffic safety. Justice Gower goes on to conclude that stops that are not entirely arbitrary, such as stops based on a

suspected traffic violations, do not require the Crown to demonstrate that the officer had reasonable grounds for their suspicion. Rather, the evidence need only disclose a rationale connected to a legitimate highway safety concern (see paras. 27 – 30). In the case at bar, there is no suggestion that the stop was discriminatory or to further an unrelated investigation. Cst. Tower's suspicion that Mr. Charlie had gone off the road, causing the cloud of dust, represents, in my view, a legitimate highway safety concern. Furthermore, there was uncontradicted evidence that Mr. Charlie had been observed speeding earlier, also a legitimate highway safety concern. Per the *Rowat* decision, Cst. Tower's suspicion need not have been based on reasonable grounds.

[9] I would note, however, that Cst. Tower's evidence is entirely supported by the WatchGuard video, which shows the dust cloud off to the side of the road as the police car comes around the corner, with only Mr. Charlie's vehicle in the immediate vicinity. No dirt or gravel is readily observable on the roadway itself. Thus, even though reasonable grounds are not required to justify the stop, I find that it was, nonetheless, entirely reasonable for Cst. Tower to conclude that Mr. Charlie's vehicle had ventured off the roadway onto the shoulder causing the cloud of dust.

[10] I am satisfied that the traffic stop was lawful in all of the circumstances.

'Last Chance' Opportunity

[11] Turning to the second issue, defence counsel argues that Cst. Tower should have offered Mr. Charlie another opportunity to provide a sample after he advised Mr. Charlie that he would be charged with refusal if he chose not to provide a suitable

sample. This is often referred to as a 'last chance' warning or opportunity to provide a sample.

[12] There is no 'last chance' obligation in the legislation, but there are certainly numerous cases that speak to offering a 'last chance'. Many of these are situations in which the accused changes their mind, after being advised of the consequences of refusal, and offers to provide a sample.

[13] With respect to the obligations on police in this regard, this issue was addressed by the Ontario Superior Court of Justice in *R. v. Grant*, 2014 ONSC 1479, in the context of a summary conviction appeal. The accused had been convicted of refusal after being given 30 chances to provide a suitable sample. She had repeatedly been given clear instructions on how to provide a suitable sample and warned of the consequences of failing to provide a sample. She was not told she was being given one final chance before the officer charged her with refusal. Nor was she given another chance at her request after being charged. The conviction for refusal was upheld. Beginning at paragraph 80, Durno J. notes:

> 80 I am not persuaded that there is an obligation on the demanding officer *in every case* to tell the driver that it is his or her last chance to provide a suitable sample. Nor am I persuaded that whenever a driver is told he or she is going to be charged with refusing to provide an *Intoxilyzer* sample, that simply asking for another chance means the offence has not been completed. Were it as the appellant appears to contend, the procedure could never end.
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> 81 What is required in each case is a fact-specific analysis to determine whether the elements of the offence have been established beyond a reasonable doubt by the Crown. Those elements are: i) a valid demand, ii) the failure or refusal of the detainee to provide a suitable breath sample, and iii) that the detainee intended to refuse to provide a suitable breath sample.

> 82 The determination of whether the last element above, the *mens rea* component, is satisfied beyond a reasonable doubt will require a case-specific analysis of all the circumstances, including the following:
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> i) the words and actions of the detainee from which the officer concluded he or she intended to refuse to provide a suitable sample;
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> ii) the number of opportunities the officer provided to the detainee;
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> iii) the instructions provided to the detainee by the officer including any reference to the applicable law, how to provide the sample, and whether the detainee was told they were being given one last chance to provide the breath sample;
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> iv) the detainee's state of intoxication and attitude;
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> v) the availability of the technician and Intoxilyzer; and
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> vi) where the detainee has been told that he or she has refused to provide a suitable sample and will be charged and indicates they want another opportunity, the time between being told of the charge and the offer, the number of opportunities to provide a breath sample and previous "last chance" offers, and the manner in which the offer is made. These criteria will assist in determining whether the request was *bona fide*.
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> 83 Where the detainee offers to provide a "last chance" sample, it will be for the officer initially, and at trial for the trial judge to determine whether the post-charge offer was *bona fide* and whether the refusal and the subsequent offer were part of "one transaction."

[14] In this case, the facts relating to the refusal are captured in the WatchGuard video, which shows Mr. Charlie making six separate attempts to provide a suitable breath sample. Following the sixth attempt, Mr. Charlie asks if he can say no. Cst. Tower tells him he can say no if he wants. Mr. Charlie indicates he will say no, because he cannot do it. He references his heart problems as the reason. Cst. Tower advises him that his heart problem should not affect the ability to provide a sample, but Mr.

Charlie says he declines to provide another sample. Cst. Tower tells him that if he refuses, he will be charged with refusal. Mr. Charlie says, “okay, sure, because I can’t do this”. He talks again about his heart problems. Cst. Tower repeats that his heart should not affect his lungs, but says, “if you don’t want to do it that’s fine”. Cst. Tower then arrests Mr. Charlie for refusing to provide a sample.

[15] Applying the factors set out in *Grant*, firstly, as previously noted, the defence takes no issue with the validity of the demand. Secondly, the video clearly shows that Mr. Charlie failed and then refused to provide a sample. With respect to whether he intended to refuse, applying the considerations set out in *Grant* in relation to the *mens rea* element, I note the following:

i) The words used by Mr. Charlie to signify his refusal were clear and unequivocal;

ii) He was provided six opportunities to provide a suitable sample before he decided to refuse. Cst. Tower was clearly prepared to allow Mr. Charlie to make further attempts, and tried to persuade Mr. Charlie that heart problems should not affect his ability to provide a sample;

iii) Both Cst. Tower and Cst. Perry provided clear instructions to Mr. Charlie on how to provide a suitable sample, and there is no indication that Mr. Charlie had any difficulty understanding those instructions. When asked if he could say no, Mr. Charlie was told he could decline to provide a sample, but was warned that if he did so, he would be charged with refusal;

iv) Mr. Charlie's attitude was cooperative, and he did not present as being grossly intoxicated;

v) The ASD was readily available and apparently operable throughout; and

vi) Mr. Charlie did not make any request to try again after being told that he would be charged with refusal if he did not provide a sample. Instead, he says, "okay, sure, because I can't do this". There is absolutely no indication that Mr. Charlie would have made another attempt even if Cst. Tower had expressly offered him one.

[16] In all of the circumstances, I am satisfied that Crown has established the requisite *mens rea* beyond a reasonable doubt.

Reasonable Excuse

[17] This leaves the remaining issue of whether Mr. Charlie had a reasonable excuse to refuse to provide a sample. It is this argument that forms the basis of Mr. Charlie's primary defence to the charge. In short, he argues that he had a reasonable excuse for refusing to provide a sample on the basis that he was physically incapable of complying despite his best efforts.

[18] The onus is on the defence to establish a reasonable excuse on a balance of probabilities (see *R. v. Goleski*, 2015 SCC 6).

[19] The defence of reasonable excuse, in this instance, relies entirely on Mr. Charlie's own evidence. Mr. Charlie testified that he was 63 years old at the time of the

offence. He says that he was willing to comply with the demand, but that nearby forest fires made it difficult for him to breathe in and out after being exposed to the smoke in the air on a daily basis for over a month. He says he did not think to let the officer know that he was having difficulty breathing. He also mentions a heart condition as a contributing factor to his inability to provide a proper sample. He says he tried his best to provide a sample, but just could not do it.

[20] Dealing first with Mr. Charlie's heart, in my view, there is no air of reality to the suggestion that Mr. Charlie's heart condition in any way impacted on his ability to provide a suitable breath sample. Firstly, he admitted on cross-examination that he has received no actual medical diagnosis as to the nature of his heart condition. Secondly, he agreed that his heart condition does not affect his breathing. Thirdly, Mr. Charlie also testified that he only mentioned his heart condition to Cst. Tower as his heart, in his words, "started going" after the fifth attempt to provide a sample. This would indicate that Mr. Charlie's heart condition did not, in any way, impact on his inability to provide a suitable sample on his first four attempts. Absent medical evidence as to what Mr. Charlie's heart condition is and how it might negatively impact on his ability to provide a breath sample, there is simply no basis to conclude that whatever issues Mr. Charlie experiences with his heart in any way prevented him from providing a suitable breath sample.

[21] This leaves the question of whether Mr. Charlie's assertion that he was unable to provide a suitable sample because he was having difficulty breathing due to forest fire smoke is sufficient to establish a reasonable excuse. In my view, Mr. Charlie's evidence in this regard is simply not credible. The WatchGuard video does not show

any indicators that Mr. Charlie was having difficulty breathing during his interaction with the police. As noted by Crown, there is no observed wheezing, coughing, or shortness of breath on the video. Nor did Cst. Tower observe anything to suggest that Mr. Charlie was having difficulty breathing.

[22] On the other hand, there are clear indicators in the evidence that Mr. Charlie was deliberately not providing a suitable sample. Cst. Tower testified that Mr. Charlie's first attempt, the ASD indicated that he was not blowing hard enough. On the second attempt, Mr. Charlie was not forming a seal and the air was escaping the tube. On the third attempt, Mr. Charlie sucked back rather than blowing into the device. The fourth attempt was similar to the first in that insufficient air was provided. On the fifth attempt, following a detailed explanation on how to provide a suitable sample, Mr. Charlie was providing sufficient air, as indicated by the tone emitted by the device, when he suddenly stopped blowing. Cst. Tower noted that it did not appear that Mr. Charlie had run out of breath, but that he abruptly stopped blowing. On the sixth attempt, again the tone indicated an initial suitable sample, but Cst. Tower then noted Mr. Charlie started to suck air back in.

[23] Cst. Tower's evidence is supported, to some extent, by the objective evidence of the WatchGuard video. In particular, one can hear the air escaping on the second attempt with the insufficient seal, and the two instances wherein Cst. Tower describes Mr. Charlie as sucking back are readily apparent in the video, as well.

[24] I do not find Mr. Charlie's assertion that he was incapable of providing a suitable sample to be credible. In the result, the defence has failed to establish, on a balance of probabilities, that Mr. Charlie had a reasonable excuse for refusing to provide a sample.

[25] Accordingly, I find that the evidence establishes, beyond a reasonable doubt, that Mr. Charlie refused, without reasonable excuse, to provide a suitable breath sample pursuant to a lawful demand, and is therefore guilty of the offence as charged.

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RUDDY T.C.J.