Citation: *R. v. Schiffner*, 2020 YKTC 29

Date: 20201007
Docket: 18-11032
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

CHRISTIAN SCHIFFNER

Appearances:
Leo Lane — Counsel for the Crown
David Tarnow — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] RUDDY T.C.J. (Oral): Christian Schiffner is before me for trial on a single count of operating a motor vehicle, on December 2, 2018, while the concentration of alcohol in his blood exceeded the legal limit, contrary to s. 253(1)(b) of the *Criminal Code*, as it then was. The companion charge of impaired driving was dismissed on the trial date at the Crown's invitation.

[2] With respect to the remaining count, counsel for Mr. Schiffner has filed a Notice of *Charter* Application seeking exclusion of the breath sample readings and Certificate of Qualified Technician filed as exhibit 3, on the basis Mr. Schiffner's ss. 8, 9, and 10(b) *Charter* rights were breached. Specifically, the issues to be addressed are as follows:

1. Did Cpl. Warren lack the reasonable suspicion required to make the demand for a breath sample into an approved screening device ("ASD"), rendering the detention arbitrary contrary to s. 9 and the taking of breath samples an unreasonable seizure contrary to s. 8 of the *Charter*? and;
2. Was Mr. Schiffner's s. 10(b) right to counsel breached on the basis he was not permitted to contact his counsel of choice?

Facts

[3] The case for the Crown rests primarily on the evidence of Cpl. Warren who testified that he was on nightshift on December 2, 2018, patrolling in Dawson City, Yukon in a marked police vehicle in the early morning hours. He observed a dark coloured sedan travelling at a regular rate of speed. The car made a sudden left-hand turn onto Dugas Street without first slowing down. The brake lights came on as the vehicle was turning, putting the vehicle into a sideways skid. The vehicle went into a snow bank, bounced off, overcorrected and swerved into the oncoming lane before moving back into the proper lane. Cpl. Warren activated his emergency lights and the vehicle pulled into what was later learned to be Mr. Schiffner's driveway.

[4] The officer described the conditions as winter with packed snow that can be icy. He could not recall if the road was freshly sanded, but noted that the roads are generally sanded and maintained through the winter months. His General Report indicated that the roads were sanded and well kept and the night was clear. It should be noted, however, that the photograph filed as exhibit 1 depicting Cpl. Warren and Mr.

Schiffner standing in front of the police vehicle during the traffic stop does not appear to show any sand or gravel on the roadway.

[5] Cpl. Warren went to speak to the driver, asking him to get out of the vehicle and to provide his driver's licence. He confirmed the driver to be Mr. Schiffner via his driver's licence. Cpl. Warren indicated there was a communication barrier as English was not Mr. Schiffner's first language. Cpl. Warren made the following observations of Mr. Schiffner:

- Watery, glassy eyes;

- A smell of liquor was emanating from Mr. Schiffner. Cpl. Warren testified the odour was that of consumed liquor not spilled, indicating that the smell is distinctly different, but Cpl. Warren could not say if the smell was coming from Mr. Schiffner's breath or body;

- No slurred speech could be discerned, though Mr. Schiffner spoke with a thick accent; and

- Mr. Schiffner was stable and steady on his feet, had no difficulty getting out of his vehicle, and nothing unusual was observed about his movements or coordination.

[6] Cpl. Warren asked Mr. Schiffner if he had had anything to drink. Mr. Schiffner said he had not. Cpl. Warren believed Mr. Schiffner had consumed alcohol based on his observations as noted above and on the driving pattern. He, therefore, made the ASD demand. A proper sample was received from Mr. Schiffner on the second attempt

which registered a fail. Cpl. Warren says that the failure on the ASD made it absolute in his mind that Mr. Schiffner had been operating a motor vehicle with a blood alcohol level over 80 mg/%.

[7] Cpl. Warren told Mr. Schiffner that he was being detained for an impaired driving investigation and then placed him in the back of the police vehicle. Cpl. Warren advised Mr. Schiffner that he was under arrest for impaired driving and read him his *Charter* right to counsel. The two then had a discussion about counsel which led Cpl. Warren to understand that Mr. Schiffner wanted to talk to a specific lawyer.

[8] Next, Cpl. Warren read the breath demand. He further explained that the breath demand meant that Mr. Schiffner would have to come to the detachment to provide more samples of his breath to determine his blood alcohol content, and that if he refused, he would be charged with an offence. When asked if he understood, Mr. Schiffner said, “You want to arrest me” to which Cpl. Warren replied, “You are under arrest”. Cpl. Warren asked if he understood he had to go back to the detachment to give breath samples and Mr. Schiffner asked if he will be arrested then. Cpl. Warren again told Mr. Schiffner that he was already under arrest.

[9] Cpl. Warren then transported Mr. Schiffner to the RCMP detachment. Cpl. Warren says that there was a lengthy discussion about counsel and that Mr. Schiffner spoke to Legal Aid.

[10] Ultimately, Mr. Schiffner provided two samples of his breath at 3:49 and 4:11 a.m., both registering at 230 mg/%.

Issue 1: Reasonable Suspicion and the ASD

[11] Turning to the first issue, s. 254(2), as it then was, authorized a peace officer who has reasonable grounds to suspect that a person has alcohol in their body and has operated a motor vehicle within the preceding three hours to make an ASD demand.

[12] In *R. v. Sidney*, 2018 YKTC 37, Chisholm J. summarized the law in relation to assessing the reasonable suspicion requirement as follows in paras 19 - 21:

> 19 The decision in *R. v. Loewen*, 2009 YKTC 116, considered the requirements for making a demand:
>
> > [6] The test, obviously, is not a demanding or high level one. There must only be a reasonable suspicion that there is alcohol in the accused's body. A mere suspicion without a reasonable evidentiary basis or a hunch that the driver has had something to drink is insufficient to justify a demand to provide a screening sample.
>
> 20 As stated in *R. v. Chehil*, 2013 SCC 49:
>
> > [26] Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, Binnie J. provided the following definition of reasonable suspicion, at para. 75:
> >
> > > The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.
>
> 21 In *Schroeder v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 2366, the Court stated:

> [14] It is the consumption of alcohol alone that provides grounds for the demand, not its amount or behavioural consequence...All that the officer requires is a reasonable suspicion that the person operating the vehicle had alcohol in their body. The officer does not have to believe that the accused has committed any offence. …

[13] In this case, Cpl. Warren based his reasonable suspicion on Mr. Schiffner's driving pattern, his watery, glassy eyes, and the smell of alcohol emanating from his person.

[14] Counsel for Mr. Schiffner argues that Cpl. Warren's subjective suspicion for making the ASD demand was not objectively reasonable, resulting in an arbitrary detention and unreasonable search and seizure. Counsel relies on the decision of *R. v. Wabisca*, 2019 YKTC 39, a case also involving an erratic driving pattern. In *Wabisca*, Cozens J. noted the following at paras. 36 and 37:

> 36 Despite speaking to Mr. Wabisca from a fairly close proximity, Cst. Miller did not make any observations consistent with the consumption of alcohol. In addition to the absence of any odour of liquor, there was no notation of slurred speech, flushed face, bloodshot eyes, fumbling with documents, or any other indicia with respect to Mr. Wabisca's person consistent with the consumption of alcohol. To some extent, the absence of these and other indicia of alcohol consumption are contra-indicators to the issue of the presence of alcohol in Mr. Wabisca's body.
>
> 37 In saying this, I am cognizant that none of these indicia, including the presence of an odour of liquor, are required or necessary in order for a reasonable suspicion to exist so that the roadside screening device demand can be provided. Everything that a police officer observes must be taken into account. Factors, which on their own, are unremarkable and possibly consistent with innocent explanations, need to be considered in the constellation of all the other factors and can, as a result, amount to a basis for a reasonable suspicion to be formed.

[15] Based on *Wabisca*, defence counsel argues that the lack of indicia such as slurred speech or issues with fine and gross motor coordination should cause me to conclude that Cpl. Warren's suspicion was not objectively reasonable.

[16] In comparing the two cases, however, there is one glaring difference: the investigating officer in *Wabisca* did not note any smell of alcohol. While the cases are clear that a smell of alcohol is not necessarily required to find a reasonable suspicion (see *R. v. Zoravkocic* (1998), 112 O.A.C. 119; and *R. v. Hryniewicz*, 2000 O.J. No. 436 (O.N.C.A.)), it must be remembered that, at issue, is whether there are grounds to suspect that a person has alcohol in his or her body, not whether the person is impaired. It is only logical to conclude that where there is no smell of alcohol, more will be required, such as indicia more commonly associated with actual impairment not just consumption, to establish an objectively reasonable suspicion that a person has alcohol in their body.

[17] Conversely, where the smell of alcohol is present, less will obviously be required to satisfy the court that there are objectively reasonable grounds to suspect the person has alcohol in their body.

[18] The Crown has provided three cases where little beyond the smell of alcohol was required to uphold a reasonable suspicion. In *R. v. Lindsay* (1999), 134 C.C.C. (3d) 159 (O.N.C.A.), the Ontario Court of Appeal held that the smell of alcohol on a person's breath was sufficient for a reasonable suspicion. In *R. v. Barnie*, 2017 YKTC 8, speeding and an unsafe turn combined with a smell of liquor on the breath were found by Cozens J. to amount to an objectively reasonable suspicion. Similarly, in

R. v. Beebe, 2018 YKTC 14, Chisholm J. found that a vehicle crossing slightly over the center line several times plus glassy eyes and the smell of alcohol amounted to a reasonably held suspicion justifying the ASD demand.

[19] I agree with the Crown that the case at bar is factually more similar to the *Barnie* and *Beebe* decisions than it is to the *Wabisca* decision. Mr. Schiffner's driving pattern, when combined with the glassy eyes, and the smell of consumed alcohol emanating from his person, is sufficient to satisfy me that Cpl. Warren's suspicion that Mr. Schiffner had alcohol in his body was objectively reasonable. In the result, I am satisfied that the ASD demand was lawful, and the defence has not established a breach of ss. 8 or 9 of the *Charter*.

Issue 2: Right to Counsel of Choice

[20] With respect to the second issue, defence counsel argues that Mr. Schiffner's right to counsel was breached as he was not allowed to call counsel of choice.

[21] The evidence relating to Mr. Schiffner's exercise of his right to counsel is disturbingly limited. The only definitive evidence is that recorded in the police vehicle, which Crown has kindly transcribed as follows:

> *RW = Cpl. Ryan Warren*
> *CS = Christian Schiffner*
>
> RW: I have some stuff to read to you, ok? You are under arrest for impaired driving. You have the right to retain and instruct a lawyer without delay. You may call any lawyer you choose to seek immediate legal advice. A legal aid lawyer is also available at any time to provide you with free legal advice. The police will provide you with a telephone and telephone numbers to assist you to contact a lawyer of your choice. You may speak to a lawyer of your choice in private at the detachment. In

addition to free legal advice at this time, if you are later charged with an offence, you may apply to legal aid to seek free legal assistance. Do you understand?

CS: Yeah

RW: Ok. Do you want to contact a lawyer?

CS: Yeah

RW: All right, do you have a lawyer or do you want legal aid?

CS: I have a lawyer

RW: Sorry?

CS: I have a lawyer

RW: Ok, do you have his phone number and everything?

CS: Well not here right now

RW: Ok--

CS: Well, it's Saturday night[1]

RW: Yeah. Ok, well we'll nail down those details back in the detachment, ok?

[1]Technically, the traffic stop was initiated early Sunday morning, but the night before (December 1, 2018) was a Saturday.

[22] It is clear from this exchange that Mr. Schiffner had expressed a desire to call a lawyer of his own choosing. Shortly after the exchange, Cpl. Warren transported Mr. Schiffner to the RCMP detachment. There is no audio or video footage from the detachment.

[23] Cpl. Warren's only independent recollection is that due to the language barrier, he had to explain the lawyer process several times in different ways because Mr. Schiffner seemed to have difficulty understanding. Cpl. Warren has no other independent recollection of what transpired regarding discussions about and

implementation of the right to counsel. The only notation Cpl. Warren made was in his report, prepared that day or the next, in which he wrote, “lawyer options discussed; he stated wanted to talk to Legal Aid”. He indicated that Mr. Schiffner spoke to a Legal Aid lawyer for approximately five minutes.

[24] The only other evidence was what Cpl. Warren indicated he would have done based on his usual practice. Firstly, he says that it is his practice in every case to provide as much information to accused persons as possible, including that calling a specific lawyer in the middle of the night usually does not work out well, but that Legal Aid is available. He says he asks accused persons, “So, what do you want to do? Try a lawyer of your choice; or Legal Aid that is available now?” He says he would never deny them trying to contact counsel of choice, but gives them ‘the facts’. If they insist on counsel of choice, he will go online to try to find a number.

[25] Similarly, Cpl. Warren has no recollection if Mr. Schiffner expressed any dissatisfaction with his call to Legal Aid, but says if someone expresses dissatisfaction, his practice is to discuss it with them. It would also be his practice to make a note of it.

[26] Defence relies primarily on the case of *R. v. Edzerza-MacNeill*, 2019 YKTC 3, in arguing that there has been a s. 10(b) breach in this case. The facts of *Edzerza-MacNeill* are that the defendant, when first asked if she wished to call counsel, said she would deal with it later. Subsequently, at the detachment, the investigating officer asked her if she wished to speak to Legal Aid, and when she said she did wish to speak to a lawyer, the officer contacted Legal Aid on her behalf. Cozens J., in finding a breach of the right to contact counsel of choice noted at para. 60:

> In my opinion, once Ms. Edzerza-MacNeill said that she wished to speak to legal counsel, Cst. Smee was required to ensure that she was provided the opportunity to speak with either counsel of choice or legal aid duty counsel. The fact that Ms. Edzerza-MacNeill did not have a particular counsel in mind does not alter my opinion. It may be that if she had been provided a list of lawyers to choose from she may have done so. It may be that she would have asked her grandmother if she could help her contact a private lawyer, a step that has been approved in the jurisprudence.

[27] It should be noted that in *Edzerza-MacNeill*, the accused did testify.

[28] Crown argues that a s. 10(b) breach has not been made out in this case as there is no evidence that Cpl. Warren interfered with the accused's right to counsel, or that Mr. Schiffner made any indication he wished to pursue contacting his counsel of choice. Crown says that there is uncontroverted evidence that Mr. Schiffner did speak to a lawyer, and that the onus is on him, not the Crown, to satisfy the court that the police prevented him from speaking with a different lawyer.

[29] It should be noted, however, that notwithstanding the onus on the accused to establish a breach on a balance of probabilities, there are still evidentiary expectations on the Crown when a *Charter* breach is alleged. Section 10(b) of the *Charter* places both informational and implementational obligations on the police. In my view, there is a burden on Crown to demonstrate that these obligations have been appropriately discharged.

[30] In *R. v. Luong*, 2000 ABCA 301, the Alberta Court of Appeal addressed these obligations in para. 12, partially excerpted as follows:

> For the assistance of trial judges charged with the onerous task of adjudicating such issues, we offer the following guidance:

1. The onus is upon the person asserting a violation of his or her Charter right to establish that the right as guaranteed by the Charter has been infringed or denied.

2. Section 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person.

3. The informational duty is 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.

4. The implementational duties are two-fold and arise upon the detainee indicating a desire to exercise his or her right to counsel.

5. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)". R. v. Bartle (1994), 92 C.C.C. (3d) 289 (S.C.C.) at 301.

6. The second implementational duty is "to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger)". R. v. Bartle, supra, at 301.

7. A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.

8. If the trial judge concludes that the first implementation duty was breached, an infringement is made out.

9. If the trial judge is persuaded that the first implementation duty has been satisfied, only then will the trial judge consider whether the detainee, who has invoked the right to counsel, has been reasonably diligent in exercising it; the detainee has the burden of establishing that he was reasonably diligent in the

> exercise of his rights. R. v. Smith, (1989), 50 C.C.C. (3d) 308 (S.C.C.) at 315-16 and 323.
>
> …

[31] With respect to reasonable opportunity, I agree with Cozens J. in *Edzerza-MacNeill* that reasonable opportunity to contact counsel includes reasonable opportunity to contact counsel of choice (see para. 59).

[32] The difficulty in assessing whether Mr. Schiffner was given a reasonable opportunity to contact counsel of choice, in this case, is the woefully inadequate record kept by Cpl. Warren and his lack of any independent recollection. He testified to having extensive discussions with Mr. Schiffner regarding the right to counsel, but can recall nothing of those discussions, and his only notation was “lawyer options discussed; he stated wanted to talk to Legal Aid”. There is little in the evidence to explain what happened, as a result of those discussions, to Mr. Schiffner’s request to contact counsel of choice.

[33] Crown relies on the case of *R. v. Wolbeck*, 2010 ABCA 65, in support of the proposition that an accused who has, with the assistance of the police, spoken to counsel may find it difficult to establish a breach of their right to counsel without testifying on the *voir dire* (see para. 12). As with the case at bar, the Court of Appeal noted that there was uncontradicted evidence that the accused had spoken to Legal Aid, and the Trial Judge had found as a fact that the police made the call to Legal Aid at the request of the accused. The Alberta Court of Appeal was satisfied that this was sufficient to discharge the implementational duty of providing a reasonable opportunity to exercise the right to counsel.

[34] Crown argues that the uncontradicted evidence of Cpl. Warren's notation that Mr. Schiffner said he wanted to speak to Legal Aid and the fact that he apparently did speak to Legal Aid makes the case at bar analogous to *Wolbeck*. However, it is notable, in my view, that the Court of Appeal in *Wolbeck* went on to say at para. 23 that "there is no evidence that the police contrived in some way to make the respondent consult Legal Aid rather than some other counsel. Indeed, there is no evidence that the respondent ever had any intention to consult anyone other than Legal Aid." This is distinctly different from Mr. Schiffner's case in which there is clear evidence that Mr. Schiffner had indicated a desire to contact counsel of choice rather than Legal Aid.

[35] Furthermore, the facts of this case raise a very real question about whether Cpl. Warren can be said to have 'contrived' to make Mr. Schiffner consult Legal Aid rather than his counsel of choice. As noted, Cpl. Warren testified that it is his practice to tell all accused persons that, in his experience, contacting a specific lawyer in the middle of the night does not usually work out well, but that Legal Aid is available right now.

[36] While Cpl. Warren suggested that his aim with this practice is simply to assist accused persons in making their decision by providing them with as much information as possible, I find this assertion to be highly suspect. Cpl. Warren is in effect saying to them "you are not going to reach private counsel anyway, so you might as well call Legal Aid". It is more likely true than not that Cpl. Warren's intent is to avoid the inconvenience of trying to track down private counsel. I am satisfied that if not the express intent, certainly the effect of this practice is to actively discourage accused persons like Mr. Schiffner from exercising their right to contact counsel of choice.

[37] Crown argues that there was no evidence that Cpl. Warren actually did this with Mr. Schiffner; however, Cpl. Warren was clear that where something was his practice, he would have done the same in this case. I am satisfied that Cpl. Warren used words to this effect in his extensive discussions with Mr. Schiffner about his right to counsel.

[38] Crown also argues that the Supreme Court of Canada, in *R. v. McCrimmon*, 2010 SCC 36, and *R. v. Willier*, 2010 SCC 37, has found such conduct to be permissible. In my view, these cases are clearly distinguishable. In both, the accused were given the opportunity to contact counsel of choice. It was only after they were unsuccessful in reaching counsel of choice that the officers asked if they would like to call Legal Aid instead. This is a very different situation than Cpl. Warren's practice of discouraging accused persons from trying to contact counsel of choice at all.

[39] In the result, I am satisfied, on a balance of probabilities, that Cpl. Warren breached Mr. Schiffner's s. 10(b) *Charter* right to counsel of choice by actively dissuading him from exercising that right in favour of contacting Legal Aid.

Section 24(2)

[40] Having been satisfied that there was a s. 10(b) breach, the next question is whether the evidence of the breath sample readings and Certificate of Qualified Technician should be excluded pursuant to s. 24(2) of the *Charter*. In this case, Crown concedes that should I find, as I have, that "Cpl. Warren, acting out of expediency, discouraged Mr. Schiffner from contacting his preferred lawyer", the breach would be a serious one warranting exclusion. I would agree. Accordingly, all evidence relating to

the breath sample readings, including the Certificate of Qualified Technician, is hereby excluded from the trial proper.

_____

RUDDY T.C.J.