

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REGINA

v.

BAILEY DOERKSEN

Appearances:
Kevin Gillespie
Amy Chandler

Counsel for the Crown
Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] COZENS C.J.T.C. (Oral): Bailey Doerksen has been charged with having committed an offence contrary to s. 320.15(1) of the *Criminal Code*. Counsel for Ms. Doerksen has filed a Notice of Application alleging breaches of ss. 9, 10(a), and 10(b) of the *Charter*. Counsel seeks remedies for these breaches under ss. 24(1) and (2) of the *Charter*. The trial commenced in a *voir dire*. Judgment was reserved until today's date. This is my judgment.

Cpl. Louis Allain

[2] Cpl. Louis Allain was the only witness in the *voir dire*. He has been a member of the RCMP for approximately 13.5 years. He has been trained on the use of several

roadside sobriety devices, as well as the approved instrument, and is also a trainer on these devices. He has had considerable experience in dealing with impaired drivers over the course of his career. He has also had considerable experience in investigating traffic accidents, and is certified as a collision analyst.

[3] Cpl. Allain testified that, on May 24, 2020, at approximately 4:36 p.m., he responded to a call of a two-vehicle collision on Second Avenue across from Boston Pizza in Whitehorse. He arrived at the scene at approximately 4:42 p.m. He understood that the accident had occurred several minutes before the call to dispatch was made, and that the two vehicles were now parked in an adjacent parking lot.

[4] Cpl. Allain had the two drivers remain with their vehicles while he dealt with them separately. This was his usual practice. He asked them to stand by their vehicles. It was his regular practice to have drivers either stand by their vehicles or, in inclement weather, sit in them.

[5] Cpl. Allain spoke to the driver of the Mustang first. After speaking with him, he told the driver to wait by his vehicle while he went to speak to the other driver, Ms. Doerksen. He stated that this conversation with the Mustang driver lasted approximately four to five minutes.

[6] Cpl. Allain then went to speak to Ms. Doerksen. Cpl. Allain had not had any previous dealings with Ms. Doerksen. He stated that this conversation lasted approximately four to five minutes.

[7] Both drivers provided Cpl. Allain with the same information: the GMC Terrain being driven southbound by Ms. Doerksen made a lane change, striking the Ford Mustang being driven in the other lane.

[8] In speaking with Ms. Doerksen, Cpl. Allain noted that she slurred her speech with a few of her words, was smoking a cigarette, and was drinking from a McDonald's cup that was in a cup holder inside the vehicle. He was not sure what was in the cup. He also noted her mouth to be dry, due to observing the white saliva build-up at the corners of her mouth. He considered her eyes to be out of focus, looking to the side of his face. She was standing by her open passenger door. She had a dog in the vehicle. She was swaying while she was standing still, and was at times leaning against her vehicle.

[9] Cpl. Allain asked Ms. Doerksen if she had been drinking, as his observations were consistent with what he would notice in cases of recent alcohol consumption. Ms. Doerksen said that she had not been drinking. Cpl. Allain stated to her that she was acting a bit strange, and she said that she was just shaken up by the accident, which she considered to be a big collision. Cpl. Allain stated that he considered it to be a small collision, but appreciated that people experience accidents differently and Ms. Doerksen could be shaken up. He agreed that he did tell Ms. Doerksen that it was not a serious accident.

[10] Cpl. Allain testified that he considered that his original observations of Ms. Doerksen could possibly be attributed to adrenaline from the collision. He also considered that these could be attributed to her being impaired, but that there were no obvious signs of impairment or alcohol use. He could not smell the odour of liquor,

which he considered to be an important indicia of the consumption of alcohol.

Cpl. Allain's impression at this point in time was that Ms. Doerksen was not impaired, and that his observations of her were likely attributable to adrenaline, and to her being shaken up by the collision.

[11] Cpl. Allain testified that he always considered the possibility of impairment when he investigated a motor vehicle accident. When he asked Ms. Doerksen whether she had had anything to drink, he was seeing whether alcohol was a factor in the collision. However, at this point in time, he was actually investigating a collision under the *Motor Vehicles Act*, R.S.Y. 2002, c. 153, (the "MVA"). He stated that he saw no obvious signs of alcohol use or consumption by Ms. Doerksen when initially dealing with her.

[12] Cpl. Allain considered Ms. Doerksen to be detained for the purpose of the MVA investigation, and agreed that she was not free to go. He stated he would have told Ms. Doerksen to stay where she was while he prepared some paperwork, and that he would come back and explain everything to her.

[13] Cpl. Allain then returned to speak with the Mustang driver, and advised him how to provide a collision statement. He stated that this conversation lasted approximately one minute. The other driver was then allowed to leave the scene.

[14] Cpl. Allain returned to his police cruiser to write Ms. Doerksen a ticket for making an unsafe lane change.

[15] He then went to issue Ms. Doerksen the ticket for making the unsafe lane change, as well as to explain the ticket to her. He stated that approximately five

minutes had passed since he left Ms. Doerksen after initially speaking with her. He testified that it was his intention, after he provided her the ticket and explained the process to her, to let her leave.

[16] However, as he spoke with Ms. Doerksen from downwind, she took a big breath and exhaled. When she did so, he could smell an odour of liquor coming from her breath. The odour was not overpowering but neither was it faint. He was approximately 1.5 metres away from Ms. Doerksen when he smelled the liquor on her breath.

[17] In conjunction with his other observations of Ms. Doerksen - these being the slurred speech, balance problems, out-of-focus eyes, and a dry mouth - Cpl. Allain stated that he formed a suspicion at 4:51 p.m. that Ms. Doerksen had alcohol in her body. He immediately advised her that she was being detained for an impaired driving investigation and, at 4:51 p.m., he read her the Approved Screening Device ("ASD") demand.

[18] Ms. Doerksen refused to provide a sample of her breath. At 4:53 p.m., Cpl. Allain charged her with the 320.15(1) offence. He then released her. He did not arrest her, as he did not see any need to further delay her by doing so. He was not gathering any more evidence and she was free to leave.

[19] Cpl. Allain testified that he believed he was under no legal obligation to provide Ms. Doerksen her s. 10(b) *Charter* right to counsel prior to making the ASD demand. He agreed that after he first dealt with Ms. Doerksen, he had not yet determined whether there were grounds to suspect that Ms. Doerksen had been driving while impaired by alcohol. He testified that he wanted her to finish her cigarette so that he

could see whether there was any smell of liquor coming from her. He agreed in part that when he left Ms. Doerksen in order to speak to the other driver and prepare the MVA ticket, he was hoping that the dissipation of cigarette smoke would allow him to determine whether he would then be able to smell liquor on Ms. Doerksen's breath. He stated that he wanted to ensure her sobriety before releasing her.

Analysis

[20] Section 94(1) of the *MVA* states:

When an accident occurs on a highway, the driver or other person in charge of a vehicle that was directly or indirectly involved in the accident
(a) shall remain at or immediately return to the scene of the accident ...

[21] Pursuant to s. 106 of the *MVA*, when stopped by a police officer, an individual must remain at the scene until the police officer releases the individual.

[22] Ms. Doerksen was, effectively, detained by operation of law as a result of the accident. She was not able to leave the scene until Cpl. Allain granted her permission to do so. Not every detention, however, triggers a *Charter* right to counsel.

[23] As stated in *R. v. Jin*, 2018 ONSC 2898:

40 As the judge noted, the Court in *Suberu*, at para. 23, indicated that "not every interaction with the police will amount to a detention for the purposes of the *Charter*, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. In the Supreme Court of Canada's view, it would be "unreasonable to require that the right to counsel be given the moment the police approach any suspect in the process of sorting out the situation.": *Suberu*, at para. 32.

41 The police interaction in this case was akin to that of *R. v. Guenter*, 2016 ONCA 572, 340 C.C.C. (3d) 351 (Ont. C.A.), where the police arrived at the scene of a traffic accident and questioned the appellant asking him to accompany them to a police cruiser. The Court at para. 46 found no detention but a fluid set of events with the interaction "more in the nature of 'preliminary questioning', than a detention."

42 Here, as in *Guenter*, PC Ho was trying to "orient himself" to the scene, trying to understand what had transpired, and determine whether the appellant was an impaired driver. On the judge's findings, even after speaking to Mr. DiFranco, PC Ho still felt he needed more information to form the required reasonable and probable grounds to arrest the appellant. As a result, he continued to engage in "preliminary questioning".

[24] As further stated in *Jin* at paras. 45 and 46, even if Ms. Doerksen was detained for the purpose of investigating the possibility that she was operating a motor vehicle while impaired, the s. 10(b) *Charter* right to counsel was suspended for that purpose:

45 Second, even if, Mr. Lindsay is correct and the appellant was detained, his right to counsel was suspended whilst PC Ho investigated the possibility that he was impaired whilst driving: *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3. The Supreme Court of Canada has held that this suspension is justified because evidence obtained during the hiatus of the right cannot be used to incriminate the driver. It can only be used "as an investigative tool to confirm or reject the officer's suspicion that the driver might be impaired": *Orbanski*, at para. 58.

46 Mr. Lindsay seeks to distinguish *Orbanski* from the appellant's case on the basis that *Orbanski* was a traffic stop whereas the appellant was being investigated after an accident. I find no basis to differentiate between the two situations. If anything, being deliberately stopped by police whilst driving is far more of a "detention" than being questioned by officers who have arrived to investigate an accident reported by a civilian.

[25] See also *R. v. Harrison*, 2019 MBQB 131, and *R. v. Sweet*, 2021 SKPC 12.

[26] At the outset, I find that the testimony of Cpl. Allain was credible and reliable. I recognize that Cpl. Allain's approximations of time are somewhat inaccurate. His

estimates of four to five minutes for three separate occasions would have made the time of the ASD demand at between 4:54 p.m. to 4:57 p.m., based upon his arriving at the scene at 4:42 p.m., rather than the time of 4:51 p.m. he had recorded in his notes for making the demand. However, Cpl. Allain testified that his estimates of time are approximate only, and that he is certain that the ASD demand was made at 4:51 p.m.

[27] I find that nothing turns on this. Cpl. Allain likely spent less time than he stated between the time he arrived at 4:42 p.m. and the time of the ASD demand at 4:51 p.m., which time is recorded in his notes. He made no notes prior to the ASD demand being made. I find that this issue does not impact upon his credibility and the reliability of his evidence.

[28] Cpl. Allain's initial involvement with Ms. Doerksen was due to his investigation of the motor vehicle accident. He was acting within his lawful authority under the *MVA* when he arrived at the scene and spoke with Ms. Doerksen and the other driver.

[29] To the extent that Ms. Doerksen was detained, this detention was a legal obligation upon her under the *MVA* and she was not free to leave the scene until Cpl. Allain advised her that she could. Ms. Doerksen would have been well aware of the fact the Cpl. Allain was investigating the accident and her involvement in it when she, quite properly, waited at the scene and initially spoke with Cpl. Allain, and then remained at the scene until he told her she could leave.

[30] I am satisfied that no *Charter* right to counsel arises from this detention authorized under the *MVA*. While conducting the *MVA* investigation, Cpl. Allain had a suspicion that Ms. Doerksen may be impaired. The possibility of impairment was

always an issue for him when he was investigating motor vehicle accidents. However, he testified that this initial suspicion was insufficient for him to make the ASD demand. He contemplated that there could be other reasons for the observations he made of Ms. Doerksen.

[31] This initial lower level of suspicion did not trigger any obligation on Cpl. Allain to advise Ms. Doerksen that she was being detained for an impaired driving investigation. At that point, she was not being detained for this purpose. Ms. Doerksen was lawfully detained for the purposes of the *MVA* investigation and, as stated, no *Charter* right to counsel arose from the detention for this investigation.

[32] At most, Cpl. Allain utilized the legitimate *MVA* detention of Ms. Doerksen in the somewhat parallel process to determine whether he could come to the point where he was able to form sufficient suspicion to determine whether he would commence an impaired driving investigation.

[33] Cpl. Allain was acting well within his lawful authority to leave Ms. Doerksen standing at her vehicle while he dealt with, and released, the driver of the Mustang, and then writing Ms. Doerksen the ticket for making an unsafe lane change before returning to her to issue her the ticket, explain it to her, and then — as he had anticipated doing — releasing her from the scene.

[34] I am satisfied that Ms. Doerksen was not specifically detained or delayed in any way by the actions of Cpl. Allain in doing so. While he testified that when he went to deal with the other driver and release him, he also wanted the effects of Ms. Doerksen smoking to dissipate to allow him to satisfy himself that she was not driving while

impaired by alcohol, I find that he did not manufacture a delay of Ms. Doerksen in doing so. She was not being detained for this purpose.

[35] It was only when Cpl. Allain returned to Ms. Doerksen and smelled the odour of liquor on Ms. Doerksen's breath that he entered into the phase of the impaired driving investigation to the extent that he was required to advise her of the reason for a detention for the purposes of an impaired driving investigation, which he did immediately. He testified that he did not consider her to be detained for a *Criminal Code* investigation until he smelled alcohol on her breath at 4:51 p.m. I accept his evidence and I agree that Ms. Doerksen was not detained for the impaired driving investigation until this point in time.

[36] As well established in the jurisprudence, Ms. Doerksen's *Charter* right to counsel under s. 10(b) was suspended for the purpose of Cpl. Allain attempting to obtain a sample of her breath into the ASD. I am satisfied that Cpl. Allain had the requisite suspicion to make the ASD demand.

[37] I further find that he made the ASD demand forthwith, as required. Cpl. Allain was under no legal obligation to arrest Ms. Doerksen and provide her with her *Charter* right to counsel at this point. The offence was complete and he was not gathering any more evidence. He acted reasonably by not further detaining or delaying her by arresting her.

[38] I find there was no breach of Ms. Doerksen's s. 9 and 10(a) and (b) *Charter* rights.

[39] That is my decision in the *voir dire*, so the evidence is transferred over to the trial proper.

COZENS C.J.T.C.