Citation: *R. v. Beauchamp*, 2022 YKTC 1

Date: 20220106
Docket: 20-00244
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Brooks

REGINA

v.

JASON DALE BEAUCHAMP

Appearances:
Jane Park — Counsel for the Crown
Kyla Lee — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Mr. Beauchamp is charged with refusing to provide a sample of his breath into an approved screening device contrary to s. 320.15(1) of the *Criminal Code.*

[2] A Notice of Constitutional Argument was filed alleging breaches of Mr. Beauchamp's s. 8, s. 9, s.10(a) and (b) rights. He seeks exclusion of what the Crown alleges is the evidence of his refusal to provide a breath sample. The evidence in the application was heard in a *voir dire* where Cst. Brown of the Whitehorse detachment of the RCMP was the sole witness.

[3] As I have found merit in the argument of Mr. Beauchamp that his rights under s. 10(a) were breached, I intend to summarize the evidence as it relates to that

argument and to the s. 24 analysis which follows. I will then turn to the specific issue as raised by Mr. Beauchamp. I am of the view that the other arguments put forward by Mr. Beauchamp are without merit.

Facts

[4] Cst. Brown testified that on May 8, 2020, she was in her marked vehicle in a residential neighbourhood at approximately 8:00 p.m. when an interaction caught her eye. She had a clear view of what was happening as she was not parked far away and it was still light out. She saw a male push a female just as he was about to get into the passenger's seat of a truck. The female stormed away and into the house outside where the truck was parked. In cross-examination, Cst. Brown added that the female was trying to stop the passenger from leaving in the truck.

[5] The truck then pulled away and Cst. Brown decided to follow the vehicle and pull it over as a result of what she had just seen. She described what she had just seen as a "suspicious interaction".

[6] The truck pulled over without incident. Prior to getting out of her vehicle Cst. Brown radioed in the Alberta licence plate of the truck and was informed that it was registered to a person by the name of Beauchamp from Wildwood, Alberta. Cst. Brown approached the truck on the driver's side and asked questions of the passenger to understand what had just happened. Combining the answers from my notes of the examination in chief and cross-examination, the passenger told Cst. Brown that the house they had just left was his home and the woman seen was his wife. The passenger identified himself and his wife by name. His wife was trying to stop the

passenger from leaving and that was the reason for the push. Cst. Brown was satisfied there was no offence involved and that matter was no longer pursued.

[7] Cst. Brown agreed in cross-examination that both driver and passenger were detained at the time that she pulled the truck over.

[8] However Cst. Brown smelled “the odour of liquor in the vehicle”. As a result, she asked the driver if he had had anything to drink and Mr. Beauchamp said “two beers over there” pointing back at the house from which he had just driven. Cst. Brown then testified that she had a suspicion that Mr. Beauchamp was impaired in his operation of the motor vehicle. As will be seen in a moment, Cst. Brown changed that evidence and testified that she was processing the observations she was making at the time and had not come to that suspicion. Either way, she at no time during this part of her interaction with the occupants of the truck said that she had changed from an investigation of the passenger (and what may have been an assault) to one of the driver.

[9] Cst. Brown asked for licence and registration and Mr. Beauchamp produced both without any issues. She testified that she also noted Mr. Beauchamp to have glossy eyes. However, in speaking with him she noted that his speech was very clear and that he was cooperative and respectful. Her basis for this observation was a conversation in which Mr. Beauchamp said that he may have minor warrants out of Alberta. In the video of the entire incident played during Cst. Brown’s evidence, I could hear Mr. Beauchamp say something about how COVID had arrived and he had expected his licence to show up. As to the smell of alcohol in the cabin of the truck, and despite being at close quarters with Mr. Beauchamp, Cst. Brown was unable to isolate which of

the two individuals the smell of liquor came from or whether it came from both. Specifically, in cross-examination she agreed that she could not tell if the smell was from Mr. Beauchamp or the “intoxicated passenger”.

[10] Cst. Brown then went to her vehicle to check the licence and registration. The licence came back as valid and there was no indication of any warrants. She testified that as she was waiting to receive this information she was processing whether she had a reasonable suspicion such that she could make an approved screening device demand.

[11] Neither her notes nor her evidence are clear as to what time it was when she formed her reasonable suspicion other than she had formed it by the time that she got out of her vehicle. Cst. Brown took her approved screening device with her to Mr. Beauchamp who was still seated in his truck.

[12] She asked Mr. Beauchamp to get out of the truck out of a concern for the ambient alcohol in the air in the truck and also because she has found that most people find it easier to provide their sample when they are not seated in their vehicle.

[13] Cst. Brown read the demand and produced the device. Mr. Beauchamp expressed concerns regarding COVID that are not germane to this particular portion of the trial. He was subsequently arrested for refusal and at 8:19 p.m. read his s. 10(a) and (b) rights.

[14] Unfortunately, the evidence is not clear as to the exact time of the events already recounted. As close as I can determine, the stop of Mr. Beauchamp was at 8:04 p.m. and the time of the approved screening device demand was at 8:12 p.m.

[15] Cst. Brown placed Mr. Beauchamp in the back of her police vehicle and transported him to the Whitehorse detachment. The Crown concedes in their written submission that there was no clear and unequivocal waiver of Mr. Beauchamp's right to contact counsel and that no warning, as required by *R. v. Prosper*, [1994] 3 S.C.R. 236, was given. By this time, of course, Mr. Beauchamp has, the Crown alleges, already refused and no evidence subsequent to this admitted breach is being tendered.

Issues

[16] Did Cst. Brown breach Mr. Beauchamp's s. 10(a) rights by failing to inform him that her investigation had changed to his commission of a criminal offence?

[17] If there were such a breach what is the appropriate remedy?

Section 10(a)

[18] I have phrased the first issue in this case in very specific terms as this case is unusual in its facts. While there are many cases that deal with the change of jeopardy of a person under investigation, it is unusual to have that change of jeopardy also move from one person to another. In my view, that unique characteristic must remain at the forefront in consideration of this issue.

[19] Section 10(a) of the *Canadian Charter of Rights and Freedoms* says:

> Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> …

[20] Crown argued that no particular wording is required for compliance with s. 10(a) and, in the context of everything that happened and was said, Mr. Beauchamp received the information anticipated by s. 10(a). The Crown summarized their submission in the following way:

> In this case, Cst. Brown asking if the Applicant had anything to drink after there was an odour of alcohol coming from the vehicle which the Applicant was driving, as well as the fact that he admitted to consuming alcohol is sufficient information to comply with s.10(a).

[21] As a general proposition, the Crown is certainly correct in saying that no particular words are required. The entire context may well be – and often is – sufficient for the driver to know that they are being investigated for an offence related to their alcohol consumption prior to driving. However, the entire context in this particular case is different from what usually occurs.

[22] The truck was pulled over by Cst. Brown in order to speak with the passenger. As Cst. Brown stated in her evidence, the detention of Mr. Beauchamp started at this time. She began by questioning the passenger about what had just happened before the truck started driving. The context here is clear: the passenger is being questioned to determine if an offence, such as assault, had just occurred. The obvious reasonable conclusion in this context, different from the vast majority of other vehicle stops, is that the driver is <u>not</u> under investigation.

[23] Cst. Brown then asked Mr. Beauchamp if he had been drinking and he said “two beers over there”. Cst. Brown did not ask any further questions that would signal – that would provide the context – to Mr. Beauchamp that his consumption of alcohol is now the subject of her investigation. After all his admission of consumption of alcohol is an admission of drinking a small amount of alcohol with no mention of over what period of time those two beer were consumed. Cst. Brown certainly does not tell, or indeed let on in any way, that Mr. Beauchamp, as she said in chief, is suspected by her of impaired driving.

[24] The next step that Cst. Brown takes is to ask for licence and registration. While that is an entirely expected procedure, it certainly provides no context to Mr. Beauchamp that he is now being investigated for a criminal offence. There is then conversation between Cst. Brown and Mr. Beauchamp about whether there may be warrants out for him.

[25] It is clear from this context that, for Mr. Beauchamp, the issue is whether there are warrants for him. He has stated that explicitly. Cst. Brown says nothing which would alert Mr. Beauchamp otherwise. Yet to her mind, regardless of whether she had made up her mind about her suspicion (her evidence in chief) or was still processing what she had observed (her evidence in cross-examination), she was now investigating Mr. Beauchamp for a criminal offence.

[26] In the particular circumstances of this case, the context does not inform Mr. Beauchamp of the actual reason for his detention and I reject the argument of the

Crown to the contrary. On the totality of the circumstances I have concluded that Mr. Beauchamp could not reasonably be expected to have understood his jeopardy.

[27] Do the cases dictate a different conclusion? In my view they do not.

[28] Crown placed reliance on *R. v. Wylie*, 2008 ABPC 29, and *R. v. Miller*, 2008 BCPC 133, both of which contain a helpful summary of the law in this area. Both cases also emphasize that each case is dependant on its own facts. In the *Wylie* case, the accused had been seen to be speeding and to make two turns without signaling. It was late at night. He was stopped by the police officer and was questioned about his drinking. There was the smell of liquor in the vehicle, which the accused shared with a passenger. The driver was asked to step from the car while the officer wrote up the traffic tickets. The officer did not tell the driver that he also wanted to have him away from the vehicle so that he could determine the source of the smell of alcohol. On those facts, the Court held that the driver could reasonably be expected to have understood his jeopardy. As a result, there was no breach of s. 10(a).

[29] In my respectful view, the cases where a person's driving is in issue are ones where it can easily be inferred that they would understand their jeopardy. However, as must be stressed, those cases are very different from the facts in this case where the stop was with regard to a passenger and where, as the interaction develops, the accused explicitly states that their mind is directed to a very different jeopardy.

[30] An authority much closer to the facts of this case is *R. v. West*, 2001 BCSC 1879. In that case, the police were called to the scene of an allegation of a mischief at a 7-Eleven store. Mr. West was located nearby in the driver's seat of his vehicle. The

officer commenced investigating the mischief charge but subsequently switched to requiring an approved screening device sample. Of those circumstances the Court (sitting as a Summary Conviction Appeal Court) said at paras. 16 and 17:

> 16 In my view, it is incumbent on an officer to advise a detained person in these circumstances, where a person was being detained already on another investigation, that it is incumbent on this officer to advise this accused that he was switching topics; in effect, that he had reason to suspect that the accused now had been driving a motor vehicle with alcohol in his blood. Up until this point, the accused was being detained in the police car and being questioned on the 7-Eleven mischief call, which is why the police were called. Then some time later, the officer switches topics while the accused is still being detained, or he switches charges.
>
> 17 This defendant along with any defendant, is entitled to clarity, and the surrounding circumstances were not the usual ones, as I have said, of a roadside check where a person stopped knows exactly why he is being stopped. But even in those circumstances, the accused is entitled to know that the officer has reason to believe, or suspect, that the accused has alcohol in his body while operating a motor vehicle and to be told that he must provide a sample forthwith, or words to that effect, and that the sample is for a proper analysis of the breath.

[31] I agree with this analysis and apply it to the facts which are before me. When Cst. Brown concluded her inquiries of the passenger and then was concerned about the veracity of what Mr. Beauchamp had said about what he had had to drink, she had, on the particular circumstances of this case, to say so. Her saying so would then have satisfied the requirement that Mr. Beauchamp reasonably understood his jeopardy.

[32] To require this clarity from a police officer is not to add yet another burden to their already difficult duties. The detention of a citizen is one fraught with uncertainty, stress and even officer safety concerns. That clearly could have been the case in this matter as Cst. Brown had produced to Mr. Beauchamp quite unexpectedly, a screening device with a demand to provide a sample when, as I have found, Mr. Beauchamp

could not reasonably have been expected to understand that he was under such an investigation. To require advice to a citizen of why they are detained promptly is not just a constitutional imperative but an action of good common sense designed to remove any potential volatility from that detention.

[33] Finally, the issue of timing ought to be addressed. I note that the Crown did not argue that Mr. Beauchamp was given his s. 10(a) rights "promptly" as the section requires. Instead they sought to put the weight of their argument on the context of Mr. Beauchamp's detention providing the necessary information. Nevertheless, it should be made clear that I have considered the sequence of events. As I have said, the actual times were not the subject of clear evidence. I have found, as noted earlier, that the time of the stop and the detention was approximately 8:04 p.m. and the time of the demand was approximately 8:12 p.m. It was the reading of the demand which I find satisfied, for the first time, Cst. Brown's compliance with s. 10(a). The *Wylie* case dealt with a delay in advising of s. 10(a) rights of one to two minutes. That case also referred to a case where the delay was five minutes. Both were found, on their respective facts, to have been advised "promptly." I do not take it that "promptly" is to be determined by a stopwatch. I take it that the circumstances of what was happening in the particular case is what is key. To repeat, this case is factually unique. In this case, the time was taken up in investigating another detainee and in conducting licence enquiries. There was no good reason why Cst. Brown could not have made it clear that the investigation of Mr. Beauchamp had commenced and it was focused on his alcohol consumption. In this particular factual context, I am satisfied that when Mr. Beauchamp was eventually given his s. 10(a) rights, it was not "promptly."

[34] For all these reasons, I am satisfied that the defence has discharged the onus upon it to establish a breach of Mr. Beauchamp's s. 10(a) rights. I turn now to the issue of remedy.

Section 24(2)

[35] I am satisfied that the timing and substance of events engages s. 24(2) as it relates to the admissibility of the words used by Mr. Beauchamp and relied on by the Crown to prove the charge against him.

[36] Accordingly, I must consider the test for exclusion of evidence as set out in *R. v. Grant*, 2009 SCC 32. That case requires that I consider, first, the seriousness of the *Charter*-infringing conduct, second, the impact of the *Charter*-protected interests of the accused and, third, society's interest in adjudication on the merits. Consideration of these three factors must be balanced in determining whether admission of the evidence would bring the administration of justice into disrepute.

[37] With respect to the seriousness of the infringing conduct, I am of the view that it is serious. I say this taking into account the totality of the officer's conduct in this investigation which sheds light on the particular s. 10(a) breach. Cst. Brown was inattentive to at least – or disregarded at worst – her obligations under the *Charter*. It ought to have been clear at the outset that she was detaining two people but only questioning one on what she had seen. Then to switch her investigation to a second person without alerting them to that investigation is a serious matter. It is that initial information which brings to the person's attention that they are in jeopardy and that they ought to consider their position. In short, Cst. Brown's actions started Mr. Beauchamp's

understanding off on the wrong foot for which the repercussions continued throughout their interaction.

[38] While I have emphasized the uniqueness of the facts of this case, the constitutional requirements are not novel. Echoing what Ruddy J. said in *R. v. Burdek*, 2021 YKTC 41, at para. 96, investigatory matters pursued at the expense of constitutional requirements is unacceptable after more than 30 years of establishing those requirements.

[39] I am buoyed in this interpretation of Cst. Brown's actions by the admitted breach of Mr. Beauchamp's *Prosper* rights. Cst. Brown's candid answers in cross-examination to how this breach came about made it clear that she applied little attention to ensuring Mr. Beauchamp's rights were protected. Given how common this type of vehicle stop is for the police, the failure to satisfy well known constitutional standards makes the breach that much more serious.

[40] Second, I must consider the impact on the *Charter*-protected interests of Mr. Beauchamp. As a result of the lack of information taking this investigation where it may not have gone, Mr. Beauchamp was handcuffed, taken to the detachment, and had his rights further breached prior to his release. His loss of liberty is significant. With respect, I disagree with Crown's submission that being held in custody for approximately an hour is not significant. While I have not accepted Mr. Beauchamp's argument that his rights were breached when he ought to have been released at the scene (to return to the home while his truck was impounded), it is a fact that he lost his liberty as a result of this sequence of events. I decline to engage in the logic that "just

an hour is unimportant". It is a circumstance that can be etched in a citizen's mind for years.

[41] Third, is society's interest in adjudication on the merits. Crown has emphasized that "Crown's case will stand or fall" on this ruling and that "if anything the appropriate remedy is a reduction in sentence". Society clearly wants cases to be decided on their merits and a ruling excluding the evidence of what the Crown says is a refusal will have the effect alluded to by the Crown. Nevertheless, it is important to the long-term reputation of the administration of justice that society be satisfied that law enforcement is conducted in accordance with the established standards of that administration of justice. A reasonable well-informed citizen would understand the importance of the maintenance and respect for those standards.

[42] Balancing the three factors, I find that the first two favour exclusion. The third factor does favour inclusion but only just. On balance, I am of the view that the evidence of the words and actions of Mr. Beauchamp after the breach of his rights are excluded from the evidence in this trial. Any other conclusion would, in my view, bring the administration of justice into disrepute.

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BROOKS T.C.J.