Citation: *R. v. Devellano*, 2021 YKTC 51

Date: 20211112
Docket: 20-05179
20-00696A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

BENJAMIN FRANCIS DEVELLANO

Appearances:
Jane Park — Counsel for the Crown
Kelly McGill — Counsel for the Territorial Crown
Benjamin Devellano — Appearing on his own behalf

RULING ON *CHARTER* APPLICATION

[1] CHISHOLM T.C.J. (Oral): Mr. Benjamin Devellano is charged with the following *Criminal Code* offences: mischief (s. 430(3)); obstruction (s. 129(a)); dangerous operation of a conveyance (s. 320.13(1)); and failure to remain at the scene of an accident (s. 320.16(1)). The Crown proceeded summarily.

[2] Additionally, he is charged with three offences under the *Motor Vehicles Act*, RSY 2002, c. 153 (the "*Act*"), namely, failure to remain at the scene of an accident (s. 94(1)(a)); careless driving (s. 186); and backing up a motor vehicle when it was unsafe to do so (s. 162).

[3] The parties agreed to have both Informations proceed to trial at the same time.

[4] Mr. Devellano has brought a *Charter* application, alleging breaches of ss. 9 and 10(b), however, after the direct evidence of the investigating officer, Mr. Devellano abandoned his s. 10(b) right to counsel argument. He seeks to exclude evidence surrounding the alleged *Charter* breach, specifically that of the alleged offences.

[5] Cst. Karina Moore testified for the Crown in the *voir dire*. Mr. Devellano did not call any evidence.

Summary of the Relevant Evidence

[6] Cst. Moore became a police officer in April 2020. She responded to a complaint in Whitehorse on December 17, 2020. At approximately 9:07 p.m., she learned of a call from a local downtown business reporting a possible impaired driver. She understood that the driver of the vehicle had entered the business and raised the suspicions of the complainant. She received information from the dispatch operator that the person complained of was asleep in a white Ford truck. Upon attendance at the scene, she parked behind a white Ford F-150 truck and turned on her emergency lights. The suspect vehicle was running. According to the officer, it was snowing that evening.

[7] In Cst. Moore's testimony, she explained that, based on the initial complaint, she took an approved screening device with her when exiting her vehicle for the purposes of a mandatory alcohol screening test. Upon approaching the white Ford truck, she noted an individual in the driver's side seat leaning against the driver's side window. Initially, she was unable to get the individual's attention, but after banging on the window with

her hand and announcing her presence, the individual awoke. He opened the driver's side window, at which time she requested his driver's licence, registration and insurance. The individual was cooperative with the officer, and indicated that his name was Ben Devellano. He also provided his date of birth.

[8] Cst. Moore made the Mandatory Alcohol Screening demand. Mr. Devellano provided a sample of his breath. The screening device indicated that his blood alcohol level was zero percent. The officer testified that once she received the result, she immediately contacted another officer on shift, who was trained as a Drug Recognition Expert ("DRE"), and asked that he attend to her location.

[9] Cst. Moore explained that she requested the other officer's attendance based on the initial complaint, in which the complainant indicated that the individual was impaired by something, either a drug or alcohol; the fact that Mr. Devellano was sleeping in his vehicle; and, that he initially put down the back window of his truck after she woke him up. She also noted that Mr. Devellano had immediately stated he was not intoxicated when she interacted with him, that his eyes were glossy and his pupils tiny, and that he was slurring his words and repeating himself. She testified that the word he had slurred was "intoxicated".

[10] The officer also testified that Mr. Devellano was not wearing a jacket, which she found to be odd, considering the cold temperature. She explained that in her experience, individuals who are impaired by a drug have a higher body temperature, and are often warm.

[11] After contacting Cst. Caron to come to her location, Cst. Moore advised Mr. Devellano that he was being detained for an impaired investigation. He questioned this detention based on having passed the alcohol screening device test. According to Cst. Moore, Mr. Devellano began to become agitated. The officer indicated that she advised him on a number of occasions that he was detained because she believed that he was impaired, and she advised him that the DRE who was coming to the scene would provide him with more information about the investigation. She also provided him with his right to counsel and the police warning.

[12] Cst. Moore testified that the interactions between her and Mr. Devellano were captured on her vehicle's WatchGuard recording system. Part of this recording became an exhibit on the *voir dire*.

Positions of the Parties

[13] Mr. Devallano submits that the actions and words of Cst. Moore reveal that she subjectively believed that he was impaired, even though her belief was not objectively reasonable. As such, her request for a DRE to come to the scene must have been for the purpose of making a s. 320.28(2)(a) drug demand of Mr. Devallano, as opposed to pursuing a s. 320.27(1) screening demand. She advised Mr. Devellano that he would be subject to a "DRE assessment".

[14] Mr. Devallano asserts that since Cst. Moore did not have reasonable grounds to believe that his ability to operate a conveyance was impaired by a drug, or by a combination of a drug and alcohol, his detention was in breach of his s. 9 *Charter* rights.

[15] The Crown contends that Cst. Moore appropriately investigated the complaint that she had received. Based on the circumstances, the officer properly initiated an investigative detention of Mr. Devellano as part of an impaired driving investigation.

[16] The Crown concedes that Cst. Moore did not have reasonable grounds to believe that Mr. Devellano's ability to operate a conveyance was impaired by a drug. However, the officer had reasonable grounds to suspect that his ability to operate a conveyance was impaired by a drug. As Cst. Moore was not trained in assessing an individual for drug impairment, her detention of Mr. Devellano was reasonably necessary to allow an officer trained in drug recognition to attend the scene.

[17] The officer also provided Mr. Devellano with his right to counsel in accordance with the law on investigative detention, as per *R. v. Mann*, 2004 SCC 52.

Analysis

[18] The issue to be decided on this *voir dire* is whether the manner in which Cst. Moore investigated the complaint led to an arbitrary detention of the defendant, and if so, whether evidence of his subsequent actions should be excluded.

[19] In responding to the complaint of a possible impaired driver outside a local business, Cst. Moore located the defendant in the driver's seat of an idling vehicle matching the description provided to her. The investigating officer was clearly acting in accordance with her common law authority to check the driver's sobriety (*Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Orbanski; R. v. Elias* 2005 SCC 37) and under the authority of s. 106 of the *Act*, when she roused Mr. Devellano and requested that he

provide her with his driver's licence, as well as his registration and insurance documents.

[20] Section 106 of the *Act* reads:

> Every driver shall, on being signalled or requested to stop by a peace officer in uniform, immediately
>
> (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.

[21] Cst. Moore also acted lawfully in making an alcohol screening demand pursuant to s. 320.27(2) of the *Criminal Code*. When Mr. Devellano passed the alcohol screening test, the officer nonetheless believed, based on the information that she had received and her observations, that there was an issue with respect to his sobriety.

[22] In Cst. Moore's testimony, she was inconsistent in articulating her view of Mr. Devellano's level of sobriety. She initially referred to him as being impaired, and later during cross-examination stated that she suspected that he was impaired by a drug or a combination of alcohol and a drug.

[23] In cross-examination, Mr. Devellano suggested to the officer that she had formed the opinion that he was impaired by alcohol or a drug. She disagreed, and stated, "I was looking to see if you were able to operate that vehicle, and I wanted to have a fair assessment done". Yet, later she testified, "I believed he was impaired based on him slurring that word during our interaction, and he was unable to operate a motor vehicle

at that time because I believed he was impaired, and I needed the investigation to continue. Therefore, he was detained until we could determine if he was impaired by a drug, alcohol, or a combination of both".

[24] Cst. Moore also displayed confusion with respect to her understanding of the process to follow in a situation where an officer has reasonable grounds to suspect that a driver has a drug in their body, versus when an officer has reasonable grounds to believe that a driver's ability to operate a motor vehicle is impaired by a drug. For example, she testified that she called a DRE because she had a suspicion that Mr. Devellano was impaired. She did not appear to understand that once an officer has a suspicion that a driver has a drug in their body, the investigating officer has the authority to make a demand under s. 320.27(1)(a) for the suspect to perform physical coordination tests prescribed by regulation. Such tests, also known as standard field sobriety tests, are conducted by an officer trained to do so.

[25] Despite these deficiencies in this young officer's investigation, after Mr. Devellano passed the mandatory alcohol screening test, there were clearly objectively reasonable grounds to suspect that he was in control of a conveyance after having consumed a drug, based on the initial complaint and the officer's observations of the defendant. Therefore, she was justified in continuing to detain him for investigative purposes. In all the circumstances, it was reasonable to contact an officer who had experience in these types of investigations to attend. Cst. Moore did this quickly, and the officer, Cst. Caron, was on scene with some dispatch. While awaiting Cst. Caron's attendance, Cst. Moore explained to the defendant the reason for his detention, and, additionally, provided him with his right to counsel, and the police warning.

[26] As the Supreme Court of Canada stated in *Orbanski*, at para. 45:

> The screening of drivers necessarily requires a certain degree of interaction between police officers and motorists at the roadside. It is both impossible to predict all the aspects of such encounters and impractical to legislate exhaustive details as to how they must be conducted. … The scope of justifiable police conduct will not always be defined by express wording found in a statute but, rather, according to the purpose of the police power in question and by the particular circumstances in which it is exercised. Hence, it is inevitable that common law principles will need to be invoked to determine the scope of permissible police action under any statute. In this context, it becomes particularly important to keep in mind that any enforcement scheme must allow sufficient flexibility to be effective. The police power to check for sobriety, as any other power, [page27] is not without its limits; it is circumscribed, in the words of the majority of this Court in *Dedman* by that which is "necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference" (p. 35).

[27] It is arguable that if Cst. Caron had ultimately made a demand for physical coordination tests under s. 320.27(1)(a), Mr. Devellano could have submitted that the demand was not made immediately (*R. v. Woods*, 2005 SCC 42, at para. 14), and that the 4 ½ minute wait for Cst. Caron to arrive resulted in an unlawful demand. However, that is not what occurred. At the time when Cst. Caron was arriving on scene, Mr. Devellano chose to put up his window contrary to the direction of the police. He then departed the scene in an allegedly dangerous fashion.

[28] In all the circumstances, I do not find that he was arbitrarily detained.

Section 24(2) of the *Charter*

[29] If I am in error with respect to whether there was an arbitrary detention, I will consider whether a s. 9 breach in these circumstances should result in exclusion of the

evidence pursuant to s. 24(2) of the *Charter*. The question to be decided is whether the admission of the evidence would bring the administration of justice into disrepute (*R. v. Grant*, 2009 SCC 32).

[30] The first line of inquiry is to consider the seriousness of the *Charter*-infringing conduct. Would admission of the evidence amount to condoning serious state misconduct, or, instead, was the breach more technical in nature?

[31] In this matter, the investigating officer acted immediately to have another trained police officer attend in short order, and, in the interim, provided the defendant with the reason for his detention, his right to counsel and the police warning. Although it is somewhat troubling that she did not more clearly understand the intricacies of drug impaired driving investigations, for example, that in these circumstances she could have made a demand under s. 320.27(1)(a) of the *Code*, this was a situation that demanded further investigation. Even if she had made a demand, there would have been a delay in having a trained officer attend for sobriety testing. Having considered all of the circumstances, the resultant breach is not one of serious state misconduct. In my view this line of inquiry favours inclusion.

[32] The second factor is the impact of the breach on the defendant's *Charter*-protected interests. An arbitrary detention in this fact situation encompasses the delay in having a trained officer arrive at the scene and assess the situation. This is not a fact situation involving unjustified state interference. Driving is a licensed activity subject to the regulation of the state in order to protect life and property. The delay in this case was not lengthy. Accordingly, this branch favours inclusion of the evidence.

[33] The final line of inquiry is society's interest in the adjudication of the case on its merits. Normally, it supports a court finding that admission of the evidence would not bring the administration of justice into disrepute. The evidence in this case that is sought to be excluded is reliable and essential to the Crown's case. As such, this inquiry also favours inclusion.

[34] In the result, a balancing of the factors results in a finding that the exclusion of the evidence would negatively impact the long-term repute of the administration of justice. The evidence, therefore, should be included.

Evidence to Exclude

[35] In any event, in the circumstances of this case, I would not have found that there was evidence to exclude. All of the alleged charges stem from Mr. Devellano leaving the scene of his detention. The dangerous driving allegation alleges that he did so in a manner dangerous to the public. The video depicts two officers at his driver's side window, one standing on the truck's running boards, when Mr. Devellano backs up and appears to strike the police vehicle which was recording the interactions between police and the defendant. The truck departs quickly from the scene.

[36] There is authority that the *actus reus* of an offence may be excluded under s. 24(2) of the *Charter* in certain cases, such as a refusal to provide a breath sample (see *R. v. Cobham*, [1994] 3 S.C.R. 360; *R. v. Bagherli*, 2014 MBCA 105), or obstructing a peace officer (*R. v. Leaf*, 2016 ONSC 1974).

[37] Recently, in *R. v. Thompson*, 2020 ONCA 264, the Ontario Court of Appeal considered *Charter* breaches, including a breach of s. 9, in the context of police hemming in a car at a shopping plaza after the receipt of a complaint about drug dealing in the area. The police acted in this fashion even though they had no reasonable suspicion that the occupants of the car were engaged in criminal activity. In considering the nature of the police conduct, the Court stated at para. 62:

> But even if the appellant was free to leave on foot, as the Crown asserts, this confirms that his freedom of movement was significantly constrained. If the individual is a motorist or a driver, their freedom of movement includes the freedom to leave by driving away: … Here, the appellant's freedom to drive away was significantly constrained, which suggests that he was detained.

[38] The Court found that the driver of the vehicle was arbitrarily detained, as soon as the police boxed in his car.

[39] Although the principles flowing from *Thompson* are important considerations in interactions between police and motorists, the circumstances in the matter before me are very different than those in *Thompson*. In that case, the arbitrary detention and other *Charter* breaches led to the exclusion of drugs and money found in the accused's vehicle. The accused had not attempted to drive away from police. The evidence that Mr. Devellano seeks to have excluded does not relate to anything seized from him or requested of him, but relates to his alleged driving conduct while leaving the scene of the investigation contrary to the instructions of the police.

[40] In *R. v. Ha*, 2010 ONCA 433, the Court reviewed a decision in which the accused had been acquitted of production of marihuana and bribery charges, following a finding

of breaches of the *Charter*, including s. 9. On the Crown's appeal, the Court of Appeal upheld the trial judge's finding of *Charter* breaches. In upholding the acquittal on the production charges, the Court declined to interfere with the exclusion of the accused's statements in relation to the production charge. However, on the bribery charge, where the accused offered money to the police to let her go, the Court of Appeal held that the statements to police were admissible.

[41] The Court stated at paras. 7 and 8:

> In *R. v. Hanneson* (1989), 49 C.C.C. (3d) 467, this court considered whether a *Charter* breach insulated a detained person against liability for subsequent criminal acts. Justice Zuber, speaking for the court, said the following:
>
> > Similarly, despite a breach of s. 10(b), a detained person will attract criminal responsibility for crimes committed by words e.g. threatening death or offering a bribe. Section 10(b) has as its object the provision of counsel to those under investigation for crimes already committed in order that they might be advised with respect to making disclosure, the provision of evidence, etc. regarding of those crimes. Section 10(b) cannot possibly relate to crimes yet to come.
>
> In our view, the rationale in *Hanneson* applies equally here where there was a s. 9 breach as well as breaches of s. 10 of the *Charter*. The statements made by the respondent constituted the *actus reus* of the new offence. They did not flow causally from the *Charter* breaches.

[42] In the *Hanneson* decision, the Court considered the effect of a s. 10(b) *Charter* breach. Justice Zuber, on behalf of the Court, explained that a right to counsel breach does not insulate a detainee against liability for subsequent criminal acts. He stated "…[i]t cannot be sensibly argued that following a breach of s. 10(b) of the Charter the person detained is free to assault his custodian or commit theft without any attendant criminal responsibility…".

[43] Section 24(2) of the *Charter* speaks to the remedy of excluding evidence that was "obtained in a manner that infringed or denied any rights or freedoms guaranteed" by the *Charter*. In *R. v. Plaha*, [2004] 24 C.R. (6th) 360 (Ont.C.A.), at para. 45, the Court stated that:

> … The evidence will be "obtained in a manner" that infringed a Charter right if on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three. …

[44] A remote or tenuous link to a *Charter* breach is insufficient to trigger a s. 24(2) analysis (*R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40). Even though "a purposive and generous approach" has been adopted by the courts (*R. v. Wittwer*, 2008 SCC 33, at para. 21), in my view, the evidence sought to be excluded in the case at bar has a tenuous link both causally and contextually.

[45] As such, the alleged actions of Mr. Devellano which form the basis of the charges are not evidence that a court could exclude.

[46] In the result, Mr. Devellano's *Charter* application is dismissed.

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CHISHOLM T.C.J.