Citation: *R. v. Cawley*, 2022 YKTC 21

Date: 20220503
Docket: 21-00260
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

MORGAN CAWLEY

Appearances:
Kevin Gillespie — Counsel for the Crown
Luke S. Faught — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] RUDDY T.C.J. (Oral): Morgen Cawley has entered not guilty pleas to two counts arising in the City of Whitehorse on June 11, 2021; impaired operation of a conveyance and operating a conveyance with a blood alcohol concentration equal to or greater than 80 milligrams percent. At the outset of the trial, Crown entered a stay of proceedings with respect to the charge of impaired operation. With respect to the remaining count, Mr. Cawley has filed a Notice of *Charter* Application alleging a breach of his right to counsel pursuant to s. 10(b) of the *Charter*. He seeks exclusion of any evidence with respect to blood alcohol readings.

[2] The only evidence called on the *voir dire* in relation to the *Charter* application was that of the investigating officer, Cst. Eric Parent.

Facts

[3] The facts are not in dispute. Just after 3:00 a.m. on June 11, 2021, the RCMP received an unrelated report of a possible impaired driver leaving the Mount Sima area. Cst. Parent and another member decided to patrol the area. They came upon a large gathering of younger adults at a gravel pit. As there were beer cans scattered on the ground, the officers decided to set up a check stop to ensure no one drove out of the area while intoxicated.

[4] Approximately 45 minutes to one hour later, Cst. Parent observed a small, dark green, sport utility vehicle ("SUV") drive up what Cst. Parent believed to be an all-terrain vehicle ("ATV") or quad trail at the back of the gravel pit. Cst. Parent believed the vehicle to be travelling at a speed that was too fast for the trail conditions and type of vehicle. He further believed that the vehicle may be attempting to avoid the police check stop.

[5] Cst. Parent decided to follow the SUV in his marked police vehicle. He followed the ATV trail to Copper Road, before travelling at speeds of 80-90 km/hr in an attempt to catch up to the SUV. He eventually spotted the vehicle and activated the WatchGuard video equipment in his vehicle. He initiated his emergency lights as he was approaching the roundabout at the intersection of Hamilton Blvd. and Robert Service Way. The SUV stopped almost immediately on Hamilton Blvd. The time was approximately 4:05 a.m.

[6] Cst. Parent approached the vehicle, noting Mr. Cawley to be in the driver's seat with four other passengers in the vehicle. Cst. Parent advised Mr. Cawley that he was

being pulled over for avoiding the police road block. During the ensuing exchange regarding licence, registration, and insurance, Cst. Parent noted a smell of liquor coming from the vehicle. He noted the smell to be stronger when Mr. Cawley was speaking. As a result, Cst. Parent formed the suspicion that Mr. Cawley was operating a motor vehicle with alcohol in his body. Cst. Parent made a demand for a breath sample into an approved screening device ("ASD"). Mr. Cawley provided a suitable sample which registered a failed reading.

[7] Cst. Parent arrested Mr. Cawley for impaired driving and placed him in the back of the police vehicle. Cst. Parent reiterated that Mr. Cawley was under arrest for impaired driving, then read Mr. Cawley his right to counsel from the *Charter* card. The exchange regarding Mr. Cawley's right to counsel forms the evidentiary basis for Mr. Cawley's *Charter* application and thus is crucial to the ruling on the *voir dire*. The exchange as recorded on the WatchGuard video is as follows:

> Q: So, I have to, I'm going to give you your rights, okay? So just, uh, can you hear me good in the back there?
>
> A: (inaudible, but Mr. Cawley does nod head affirmatively)
>
> Q: I am arresting you for impaired driving. Do you understand?
>
> A: Yup.
>
> Q: (Cst. Parent reads the right to counsel from the *Charter* card) Do you understand?
>
> A: Yup.
>
> Q: Do you want to call a lawyer?
>
> A: Umm, not at the moment, I don't think.
>
> Q: So for those things I need a clear yes or no. You can always change your mind later.

A: What was the other option? My parents, or….?

Q: Sorry?

A: What is the other option?

Q: Uh, you're an adult, right?

A: Yup, I'm 19 now, yeah.

Q: Yeah, so, the only question I can really ask is do you want to call a lawyer?

A: Uh…no.

Q: Okay, like I said, if you change your mind, just let me know, okay?

[8] Cst. Parent then reads Mr. Cawley the police warning and the breath demand and confirms that he understands. Cst. Parent takes Mr. Cawley to the RCMP detachment where the appropriate observation periods are observed, and Mr. Cawley provides two samples of his breath to Cst. Conway, the qualified technician. The samples registered at 170 and 160 milligrams percent.

Issues

[9] The issues for determination on the *voir dire* are:

1. Whether Cst. Parent failed to ensure that Mr. Cawley understood his right to counsel under s. 10(b) of the *Charter*; and

2. If so, whether evidence of Mr. Cawley's blood alcohol readings should be excluded pursuant to s. 24(2) of the *Charter*.

The Law

[10] Section 10(b) of the *Charter* has both informational and implementation components. Counsel for Mr. Cawley asserts that the facts in this case give rise to a breach of the informational component.

[11] It is well established law that any waiver of the right to counsel must be clear and unequivocal. The law is equally clear that a valid waiver requires that an accused person understand the right they are purporting to waive. The law in this regard was summarized by Botham J. of the Ontario Superior Court of Justice on the appeal decision of *R. v. MacCoubrey*, 2015 ONSC 3339, at para. 39:

> "The exercise of a right to choose presupposes a voluntary informed decision to pick one course of conduct over another": *R. v. Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.), at para. 51. The legal test for the waiver of a *Charter* right is dependent upon it being clear and unequivocal that the person is forgoing the protection the right affords with full knowledge of the right and a true appreciation of the consequences of giving up the right: *R. v. Evans*, [1991] 1 S.C.R. 869, at para. 50; *Bartle*, at para. 38; *R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 274; *R. v. Borden*, [1994] 3 S.C.R. 145, at paras. 34, 36, 40; *Wills*, at paras. 69-71. The standard for waiver of a *Charter* right is high: *Bartle*, at para. 43. As observed in the *Bartle* decision, at para. 38, "[a]lthough detainees can waive their s. 10(b) rights, valid waivers of the informational component of s. 10(b) will ... be rare".

[12] The legal starting point in assessing police compliance with the informational component of s. 10(b), as it relates to ensuring comprehension of the right is the 1991 decision of the Supreme Court of Canada in *R. v. Evans*, [1991] 1 S.C.R. 869. The accused in *Evans*, known to the police to be of limited mental capacity, indicated that he did not understand his right to counsel when it was read to him. In finding a breach of s. 10(b), the Court made the following comments at para. 44:

> …It is true that they informed the appellant of his right to counsel. But they did not explain that right when he indicated that he did not understand it. A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(b) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further (unless the detainee indicates a desire to retain counsel, in which case they must comply with the second and third duties set out above). But where, as here, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.

[13] A lack of understanding may be clearly articulated, as in *Evans*, or may be inferred from the circumstances (see, for example, *R. v. Mohamud*, 2010 ONSC 5142). The law as it has evolved post-*Evans* references the existence of "special circumstances" to denote situations requiring the police to take additional steps to facilitate understanding of the right to counsel.

[14] Accordingly, a determination of whether the informational component of s. 10(b) was breached in this case turns on a determination of whether or not the evidence establishes special circumstances denoting a lack of comprehension.

[15] In *MacCoubrey*, the Court summarized what may amount to special circumstances at para. 37:

> A police obligation arising from s. 10(b) of the *Charter* is to inform a detainee of his or her right to consult with counsel without delay and how that right may be exercised. A police officer's duty to "inform" is not limited in every case to mechanically reciting the required informational data aloud -- in special circumstances capable of interfering with or preventing a detainee's understanding of the s. 10(b) right, it may be necessary for an officer to go further to take affirmative steps to facilitate understanding by repeating information, or clarifying the detainee's appreciation of the right or even undertaking a reasonable effort to explain the concepts conveyed. Put differently, in the ordinary case, telling a detainee the necessary

> information required to understand and exercise the s. 10(b) right will generally satisfy the duty upon the police: *Bartle*, [1994] 3 S.C.R. 173, at para. 39. Although there is no closed list of special circumstances, over time the jurisprudence has identified relevant situational examples -- a very young unsophisticated detainee, language difficulties, a known or obvious mental disability, an individual of apparent subnormal intelligence, a seriously physically injured arrestee, interference with the ability to hear, a verbal response evidencing uncertainty or misunderstanding of the right, etc.

Special Circumstances

[16] Crown argues that the defence has fallen short of establishing special circumstances in this case on the basis there is no positive indication that Mr. Cawley misunderstood his rights. Specifically, the Crown argues that the words uttered by Mr. Cawley, in the exchange, are capable of more than one interpretation. Absent testimony from Mr. Cawley, Crown argues it would be improper for the Court to speculate as to what Mr. Cawley meant by what he said.

[17] In my view, the cumulative effect of the exchange between Cst. Parent and Mr. Cawley does amount to special circumstances that should have put Cst. Parent on notice that more was required to ensure that Mr. Cawley fully understood his right to counsel.

[18] I reach this conclusion for the following reasons:

[19] Firstly, Mr. Cawley's initial response to whether he wanted to call counsel indicated uncertainty. Crown is quite right that numerous cases have addressed the question of "not right now" responses to whether an accused person wants to call counsel and determined that, absent evidence from the accused, they are not sufficient

to raise the inference that the accused does not understand their right to counsel (see *R. v. Chalifoux*, 2014 APBC 281; *R. v. Thome*, 2020 SKPC 36; and *R. v. Shain*, 2017 SKQB 115). However, in this case it is not the "not right now" response that causes me concern; rather it is the obvious uncertainty evident in Mr. Cawley's words. Specifically, Mr. Cawley pauses before responding and then says, "Umm, not at the moment, I don't think". More importantly, there is obvious uncertainty in Mr. Cawley's tone of voice. Not surprising when one remembers he is a young man of 19 years of age.

[20] Secondly, on the WatchGuard video, Mr. Cawley's head drops forward repeatedly throughout the exchange regarding his right to counsel. At times, he is observed to slowly raise his head; at others, he jerks his head back up quickly. This raises a very real and visible concern about whether Mr. Cawley was drifting in and out of consciousness. Something that ought to have caused the officer concern in assessing whether Mr. Cawley was fully comprehending his right to counsel. Unfortunately, it seems Cst. Parent's practice is to look at an accused only occasionally as he is dealing with the right to counsel. In this case, notwithstanding the frequency Mr. Cawley's head dropped forward, Cst. Parent did not notice what was happening, and therefore, missed an obvious indicator of a potential concern.

[21] Thirdly, when Mr. Cawley is told he needs to give a clear answer to whether or not he wants to call a lawyer, his response is, "What was the other option? My parents, or…? What is the other option". In my view, this is a clear indicator that Mr. Cawley has misunderstood his right to counsel as read to him by Cst. Parent. Mr. Cawley does not say "are there other options"; he says "what was the other option". This clearly

suggests Mr. Cawley believed there to have been another option included in the right to counsel as read to him by Cst. Parent.

[22] Finally, Cst. Parent's response to Mr. Cawley's question about calling his parents is both misleading and contributes to the confusion. Cst. Parent confirms Mr. Cawley is an adult, then says, "Yeah, so, the only question I can really ask is do you want to call a lawyer?" It is only at this point that Mr. Cawley clearly says no.

[23] My difficulty with this exchange is twofold. Firstly, Cst. Parent's non-response to the question about calling his parents, nonetheless, effectively conveyed to Mr. Cawley that he could not call his parents, which is not an accurate reflection of the law. An accused person is entitled to contact a third party to assist them in accessing counsel. Defence has filed three decisions confirming the state of the law, most notably the binding Yukon Supreme Court decision in *R. v. McNeilly*, 1988 CarswellYukon 3 (S.C.).

[24] Crown, on the other hand, has filed three cases indicating that a request to call a third party does not place any obligations on the police unless the accused indicates that they want to call the third party to get assistance in accessing counsel. This brings me to my second concern about Cst. Parent's non-response to Mr. Cawley's question about calling his parents. By not answering the question at all, except by saying "the only question I can really ask is do you want to call a lawyer", Cst. Parent is basically sending the message that he cannot or will not answer questions Mr. Cawley may have. Whether he intended to or not, Cst. Parent's response effectively shut down further inquiries, leaving Mr. Cawley to believe his only option was to answer yes or no to the question about whether he wished to contact counsel.

[25] Based on the foregoing, I am satisfied that Mr. Cawley's words, tone, and body language, taken together, raise clear concerns about whether Mr. Cawley fully understood his right to counsel before choosing to waive that right, amounting to special circumstances requiring Cst. Parent to take additional steps to facilitate comprehension. I am further satisfied that Cst. Parent's response was both misleading and contributed to the confusion.

[26] In the result, I am satisfied that Mr. Cawley has established a breach of the informational component of his s. 10(b) right to counsel.

Section 24(2)

[27] Having found a breach of s. 10(b), the remaining question for determination is what, if any, remedy is appropriate. Defence seeks exclusion of any evidence of Mr. Cawley's blood alcohol readings. This would include Exhibit A, the Certificate of Qualified Technician, and Exhibit B, the Subject Test.

[28] The test for exclusion, as set out in the Supreme Court of Canada decision in *R. v. Grant*, 2009 SCC 32, requires consideration of three factors:

1. The seriousness of the *Charter*-infringing conduct;

2. The impact on the *Charter*-protected interests of the accused; and

3. Society's interest in adjudication on the merits.

[29] These three factors must be balanced in determining whether admission of the evidence would bring the administration of justice into disrepute.

[30] With respect to the first branch of the test, there does not appear to have been a deliberate attempt by Cst. Parent to deprive Mr. Cawley of his right to counsel; however, Cst. Parent missed obvious cues that should have alerted him to concerns about comprehension. While he testified that his practice, where there are concerns about comprehension, was to re-read the *Charter* card and, if required, to explain the right to counsel in plain language; he did neither in this case. Rather his response to Mr. Cawley's questions only created more confusion. In the circumstances, I do find the breach to be a serious one. The first branch of the test would favour exclusion.

[31] In terms of the impact on Mr. Cawley's *Charter*-protected interests, it must be remembered that the right to counsel is of critical importance to the proper administration of justice. As noted by Doherty J. in the Ontario Court of Appeal in *R. v. Rover*, 2018 ONCA 745, at para. 45:

> The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. …

[32] Failure to ensure that Mr. Cawley fully understood his right to counsel before waiving it had a significant and detrimental impact on his *Charter*-protected interests. The second branch of the test would overwhelmingly favour exclusion.

[33] The final branch, society's interest in adjudication on the merits, would clearly favour inclusion given the strong societal interest in an effective response to impaired driving, along with the high reliability of the evidence in question and its crucial importance to the Crown's case.

[34] A balancing of the three branches of the *Grant* test would favour exclusion, particularly given the critical importance of the right to counsel. To find otherwise, would, in my view, bring the administration into disrepute. Accordingly, the Certificate of Qualified Technician, marked as Exhibit A, and the Subject Test, marked as Exhibit B, are hereby excluded.

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RUDDY T.C.J.