Citation: *R. v. Olson,* 2023 YKTC 26

Date: 20230914
Docket: 21-00267
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

STEPHEN OLSON

Appearances:
Kimberley Eldred — Counsel for the Crown
Christiana Lavidas — Counsel for the Defence

RULING ON *CHARTER* APPLICATION AND REASONS FOR JUDGMENT

[1] Stephen Olson is before the Court on a two-count Information alleging that on or about May 12, 2021, he committed offences contrary to s. 320.14(1)(a) and s. 320.14(1)(b) of the *Criminal Code*.

[2] The trial began with a *voir dire* on application by Mr. Olson alleging violations contrary to ss. 7, 9, and 12 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the "*Charter*"). The parties agreed to proceed with a blended *voir dire*.

[3] Mr. Olson asserts that while he was in police custody he was handcuffed behind the back and experienced discomfort when he began retching and vomiting profusely, during which time he complained about the handcuffs hurting him and having difficulty breathing. The officers kept him handcuffed behind the back, refusing to remove them or to loosen them, thus breaching his ss. 7, 9, and 12 *Charter* rights. The remedy that Mr. Olson seeks is a stay of proceedings.

[4] In this decision I will address:

1. The Facts:
    a. Undisputed facts leading to the detention of Mr. Olson;
    b. Police officer's observations leading to handcuffing Mr. Olson behind the back;
    c. The decision to keep Mr. Olson handcuffed behind the back during the period of retching; and
    d. Observations from the WatchGuard audio and video.
2. Was there a breach of Mr. Olson's s. 9 *Charter* rights?
3. Was there a breach of Mr. Olson's s. 12 *Charter* rights?
4. Was there a breach of Mr. Olson's s. 7 *Charter* rights?
5. Conclusion.

Undisputed Facts Leading to the Detention of Mr. Olson

[5] The facts leading to the detention of Mr. Olson are not in dispute. Cst. Rimanelli and Cst Moore were on patrol in downtown Whitehorse when they observed a vehicle driven by Mr. Olson travelling significantly above the speed limit with no lights on. They initiated a stop and activated the WatchGuard audio and video in the police vehicle which remained on throughout a significant portion of the investigation.

[6] Cst. Rimanelli approached the driver's side of the vehicle at approximately 3:51:00 and noted an odour of alcohol on Mr. Olson's breath. He also observed the following symptoms:

- Agitation;
- Nervousness;
- Red eyes; and
- Quick speech.

[7] Cst. Moore approached the passenger side of the vehicle and observed a partially consumed pint of Bacardi rum within Mr. Olson's reach, and a small amount of marijuana. She alerted Cst. Rimanelli to her observations and he made an Approved Screening Device ("ASD") demand. Mr. Olson provided a sample that registered a failure, was placed under arrest, and given his *Charter* rights. He was then handcuffed behind the back and placed in the rear seat of the police vehicle to be transported a short distance to the RCMP detachment, also located in downtown Whitehorse.

Police Officer's Observations Leading to Handcuffing Mr. Olson Behind the Back

[8] Based on his observations of Mr. Olson, Cst. Rimanelli supported the handcuffing of Mr. Olson behind his back. He supported the decision based on his police training and the concern for officer safety as Mr. Olson was not known to him and was agitated, behaving nervously and visibly intoxicated. In his experience, dealing with intoxicated individuals can be very unpredictable and volatile. He indicated that he has experienced violence in such circumstances.

[9] Cst. Moore testified that Mr. Olson was frantic, jumpy, moved his hands a lot, and exhibited elevated speech and actions. He was not immediately responsive to direction when being handcuffed and had to be told more than once to comply. He remained agitated and presented as a safety concern throughout the process of arrest and handcuffing. She explained that her common practice is to handcuff behind the back. Handcuffing in the front leaves police officers vulnerable as an individual can strike and can run away easier.

[10] Cst. Moore handcuffed Mr. Olson in the "normal" manner and the handcuffs were not tight. She confirmed in her testimony that when she did loosen the handcuffs later in the investigation at the direction of Cst. Rimanelli, they had not tightened.

The Decision to Keep Mr. Olson Handcuffed Behind the Back During the Period of Retching

[11] Shortly after being placed in the rear of the police vehicle, Mr. Olson started retching and was removed by the officers. Upon being removed so that he could retch

or vomit outside the police vehicle, he attempted to “slip” the cuffs by forcing them under his rear end in an attempt to pull them under himself to the front.

[12] Mr. Olson was retching or vomiting for a period of time and was complaining about having difficulty breathing and requesting to have the handcuffs removed. The officers did not remove the handcuffs, instead keeping him handcuffed behind the back. Cst. Moore noted that during this time he remained passively resistant, agitated, and exhibited constant body movements. She considered him to remain a threat and was concerned that he may attempt to run away if not handcuffed behind the back. She stated that the primary reason was for officer safety and there was no animus or motive to cause Mr. Olson discomfort.

[13] Cst. Rimanelli supported the continuation of having the handcuffs on Mr. Olson behind the back for officer safety concerns. Mr. Olson was intoxicated and vomiting, and they did not know how he would react if the handcuffs were removed. The demeanour of Mr. Olson was good, and he was following directions well, but that did not change his concern over officer safety and the need to have him handcuffed. According to Cst. Rimanelli, the discomfort experienced by Mr. Olson was “no more than usual”.

[14] Cst. Rimanelli did note that Mr. Olson was never left alone while at the roadside. Cst. Rimanelli was mostly by his side, assisting him with his balance, wiping his face on request, assisting him in blowing his nose, and trying to help him calm down and relax. When not right by his side, Mr. Olson was always in sight.

[15] The officers were concerned with the retching and vomiting, prompting them to call Emergency Medical Services (“EMS”) to their location. EMS arrived approximately

12 minutes after Mr. Olson began retching. The officer's deferred to the EMS attendants at that point regarding the preference to have Mr. Olson remain in handcuffs.

Observations from the WatchGuard Audio and Video

[16] Mr. Olson did not provide evidence in this matter regarding the impact of being handcuffed during the investigation. There was WatchGuard audio and video available, and I make the following observations from that evidence.

[17] Mr. Olson was handcuffed upon arrest at approximately 3:59:00 by Cst. Moore. At approximately 4:01:45 he was placed in the back seat of the police vehicle where he was captured by the WatchGuard video. He is observed to be fidgeting with the handcuffs and at one point straining to get his right hand into the front right pocket of his pants. He appears to fluctuate between being upset and crying to being calm.

[18] Mr. Olson remarked that the handcuffs were hurting his wrists shortly after he was straining to get his hand into his front pant pocket. In response, Cst. Rimanelli told him to stop moving around so much.

[19] At 4:07:00, after a period of being calm, he started fidgeting again and can be heard repeating the word "ouch" several times. This is followed by a further period of calm.

[20] At 4:11:30 he asked for some apple juice which was followed quickly by retching, and he is immediately removed from the police vehicle and out of view of the camera. He is heard retching or vomiting while also being warned to stop trying to "slip his cuffs".

[21] The vomiting was intermittent, and the officers continuously assisted him with his balance, wiped his face, assisted him blowing his nose, and assisted him with standing and sitting down. They can be heard consistently trying to calm him down and helping him relax. During this period, he states that the handcuffs are hurting his wrists and confirms that he needs EMS when asked.

[22] At 4:18:45, during a period of vomiting, he asked “did you call EMS?”, and received an affirmative response. Shortly after this exchange he asked for the officers to “take these off please”. The officers can be heard continuing to support Mr. Olson both physically and verbally.

[23] At 4:21:00, Mr. Olson is heard asking the officers to tell his grandmother what is happening as she was supposed to give him a ride to his home community in the morning.

[24] At 4:22:00, Mr. Olson asked, “why are these so tight?” This is followed by the decision to loosen the handcuffs and Mr. Olson states “thanks, that is all I am asking for.” At the same time, EMS arrived and he was assisted into the ambulance by Cst. Rimanelli. He was friendly and talkative throughout the initial assessment, laughing at times, until he started retching again. Cst. Rimanelli helped him out of the vehicle and continued to support him, including wiping his face and blowing his nose. There is continuous support from the police officers and the EMS attendants for Mr. Olson.

[25] At 4:45:00, Mr. Olson is assisted back into the ambulance for another assessment. He was joking with the EMS attendants and the police officers, talking and laughing.

[26] The EMS attendants decided to take him to the hospital, and he specifically requested that Cst. Rimanelli ride with him.

Was there a Breach of Mr. Olson's s. 9 *Charter* Rights?

[27] Mr. Olson's argument is not that the initial stop or following arrest constitutes an arbitrary detention. The argument put forward is that the subsequent conduct of the police officers keeping him handcuffed became arbitrary, as articulated by the Ontario Court of Justice in *R. v. Bennett*, 2009 ONCJ 95, at para. 31:

> It must also be recognized that a detention, lawful when initiated, may thereafter become arbitrary. In *R. v. Korecki*, 2007 CarswellAlta 1541, 2007 ABPC 321, 85 Alta. L.R. (4th) 185, [2008] A.W.L.D. 1244, [2008] A.W.L.D. 1247, [2008] A.W.L.D. 1248, 163 C.R.R. (2d) 341, 436 A.R. 336, the decision of the officer to place the detainee in holding cells, handcuffed, and to keep the detainee there several hours while she sobered up was unnecessary and unjustified. Handcuffs should have been safely removed or at least loosened to relieve significant discomfort to the accused and in fact, the court found that handcuffs could have been removed completely with no safety issues arising, the discomfort being known to the jailers. The court qualified the detention as despotic and capricious. *Korecki*, it should be noted, involved an accused who acted in a belligerent, aggressive and unreasonable manner. Her right to counsel was also noted to have been violated and the court commented that no attempt was made to justify the denial of this right, finding that the police acted in manner was deliberate and conscious, perhaps to teach the accused a lesson. After reviewing the various remedial options available, a stay of proceedings was granted.

[28] In *Bennett*, the defendant was handcuffed behind the back and placed in the rear seat of the police vehicle. He was then transported for 40 minutes to headquarters. Due to the backlog in processing, he was left alone in the police vehicle for another hour. The officer returned 30 minutes after their arrival to move his handcuffs to the front. The defendant provided evidence regarding the discomfort and the injuries incurred in the

process. The Justice provided the following comments regarding the use of handcuffs at paras. 27 and 28:

> 27 Police necessarily exercise discretion regarding the security required while a person is in officer's custody while detained or arrested. If the sole complaint were that the defendant was cuffed to the rear during transport, on balance, it would be fair to defer to the officer's decision. In his appreciation, the defendant was impaired. The officer was alone in the cruiser. If the defendant were in serious and unbearable discomfort or crisis, the officer could and would have responded appropriately.
>
> 28 What has not been explained is the decision to keep the subject handcuffed in the rear of the cruiser, with officer absent from the cruiser. This was not a problematic subject. He had been cooperative. There were no warrants outstanding. This is a middle-age man. He did not have a record. There was no concern about weapons. Alone in the cruiser, the defendant had no way to inform the officer of discomfort. In fact, I find that the defendant did experience an injury to his hand due to the restraints which injury manifested symptoms over the following weeks, resolving itself after about 4 weeks. This was an unnecessary consequence of the arrest.

[29] The Court concluded that leaving the accused handcuffed and alone in the police cruiser while parked in the headquarters constituted arbitrary detention. I find that the case before this Court is distinguishable from the facts in *Bennet*, and the case of *Korecki* referenced therein. The intention of the police officers was to handcuff Mr. Olson for a brief period for officer safety and to escort him a short distance to the RCMP detachment. The intervening medical issues interrupted the transport, and the officers based the decision to keep Mr. Olson handcuffed on ongoing officer safety concerns. They remained attentive to his needs and there is no evidence before the Court of significant discomfort or injury resulting from being handcuffed.

[30] I find that Mr. Olson was not arbitrarily detained at any point by the police officers on May 12, 2021, and that there was not a breach of his s. 9 *Charter* rights.

Was there a Breach of Mr. Olson's s. 12 *Charter* Rights?

[31] The Crown filed the Supreme Court of Canada decision of *R. v. Wiles,* 2005 SCC 84, wherein the Court states the test for s. 12 of the *Charter* at para. 4:

> This Court has dealt with s. 12 on many occasions and there is no controversy on the test that must be met. Treatment or punishment which is disproportionate or "merely excessive" is not "cruel and unusual": *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072. The treatment or punishment must be "so excessive as to outrage standards of decency": Smith, at p. 1072; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 499; *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 724. The court must be satisfied that "the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable": *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39, at para. 26… .

[32] In dealing with Mr. Olson, the police officers found themselves transitioning from a straightforward impaired driving investigation to an evolving and unique medical issue. The police officers maintained a supportive role with Mr. Olson, treating him with dignity while adapting to the circumstances. There may have been an earlier point to address the handcuffs, but as Cst. Moore testified "policing is dynamic…I need to read the situation and I have to react accordingly and appropriately, and there is my decision on how to handle and interact with those threats that I perceive."

[33] The Supreme Court of Canada in *R. v. Nasogaluak*, 2010 SCC 6, stated the following regarding the dynamic of policing at para. 35:

> Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances…

[34] I am not satisfied that the treatment of Mr. Olson was disproportionate such that Canadians would find it abhorrent or intolerable.

[35] I find that there was not a breach of Mr. Olson's s. 12 *Charter* rights.

Was there a Breach of Mr. Olson's s. 7 *Charter* Rights?

[36] The Supreme Court of Canada addressed the remedy of a stay of proceedings in *R. v. Babos*, 2014 SCC 16, at paras. 30 to 33:

> 30 A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
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> 31 Nonetheless, this Court has recognized that there are rare occasions - the "clearest of cases" - when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: 1) where state conduct compromises the fairness of an accused's trial (the "main" category); and 2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.
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> 32 The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
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> 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
> 2) There must be no alternative remedy capable of redressing the prejudice; and
> 3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as

> denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid*., at para. 57).
>
> 33 The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (*O'Connor*, at para. 71). But while the framework is the same for both categories, the test may - and often will - play out differently depending on whether the "main" or "residual" category is invoked.

[37] Mr. Olson's argument falls within the residual category – that the conduct of the police officers keeping him handcuffed behind the back risks undermining the integrity of the judicial process.

[38] The Court in *Babos* expands on the residual category at paras. 35 and 36:

> 35 By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial - even a fair one - will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
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> 36 In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, this Court described the residual category in the following way:
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> > For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so

> egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [para. 91]

[39] In addition to *Babos*, defence filed the Ontario Superior Court of Justice decision *R. v. Grosbeck*, 2017 ONSC 5147, wherein the Justice found a s. 7 *Charter* breach and granted a stay. Mr. Grosbeck was stopped while driving his all-terrain vehicle ("ATV") without a helmet and when asked to identify himself, a scuffle ensued that continued on the ground. The officer got up and walked towards the police vehicle and Mr. Grosbeck walked towards him with his fists clenched by his side and more words were exchanged. He then turned around and walked towards his ATV and the police officer tasered him in the back without warning. The trial Justice's conclusion was noted at para. 33:

> Keeping this in mind, the learned Justice concluded that Tasering someone without warning when the continuity of events had been broken, and the person was walking away from the altercation, offends "society's sense of fair play and decency"… .

[40] I find that the *Grosbeck* decision is distinguishable on the facts and that the misconduct of the police officer was clear upon the break of the "continuity of events". Mr. Olson's case involved a constantly changing set of circumstances and the evidence shows the police officer's continuing to adapt to those changes. They prioritized Mr. Olson's health by calling EMS, and they continuously assessed the risk posed by Mr. Olson as well as ensuring his comfort to the best of their ability in the circumstances, which included loosening his handcuffs.

[41] The Crown relied on *Nasogaluak*, involving an intoxicated accused resisting arrest and being punched several times in the head before being subdued, after which he was punched twice in the back, breaking his ribs, and puncturing his lung. The Court summarized the events that followed at paras. 12 and 13:

> 12 Eventually, Mr. Nasogaluak was taken to the police detachment. Mr. Nasogaluak provided two breath samples that placed him well over the legal blood alcohol limit. No record was made of the force used during the arrest, of Cst. Dlin's drawing of a weapon, or of Mr. Nasogaluak's injuries. The officers provided their colleagues and superiors at the station with little to no information about the incident, and no attempts were made to ensure that Mr. Nasogaluak received medical attention. Although Mr. Nasogaluak had no obvious signs of injury and did not expressly request medical assistance, he did tell Cst. Olthof on two occasions that he was hurt and was observed by Cst. Dlin crying and saying: "I can't breathe." Corporal Deweerd, the supervisor on duty, testified that he noticed Mr. Nasogaluak leaning over and moaning as if in pain. However, Mr. Nasogaluak had replied in the negative to the question of whether he was injured. …
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> 13 Mr. Nasogaluak was released the following morning and checked himself into the hospital, on his parents' insistence. He was found to have suffered broken ribs and a collapsed lung that required emergency surgery. …

[42] The Court, in *Nasogaluak*, reviewed the application of s. 25 of the *Criminal Code* to police officer use of force and confirmed the s. 7 *Charter* breach at para. 38:

> …It is enough to say, for the purposes of the present appeal, that I accept the Court of Appeal's determination that the trial judge had made no palpable and overriding error in his findings that the police had used excessive force at the time of Mr. Nasogaluak's arrest. Further, I believe that a breach is easily made out on the facts of this case. The substantial interference with Mr. Nasogaluak's physical and psychological integrity that occurred upon his arrest and subsequent detention clearly brings this case under the ambit of s. 7 (*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519). The excessive use of force by the police officers, compounded by the failure of those same officers to alert their superiors to the extent of the injuries they inflicted on Mr. Nasogaluak and their failure to ensure that he

> received medical attention, posed a very real threat to Mr. Nasogaluak's security of the person that was not in accordance with any principle of fundamental justice. On that evidence and record, we may assume that there was a breach of s. 7 and that there was no limit prescribed by law justifying such a breach. The conclusion that s. 25 was breached, in that excessive, unnecessary force was used by the police officers at the time of the arrest, confirms it.

[43] The decision of the police officers to keep Mr. Olson handcuffed behind the back during the investigation despite his retching and vomiting was supported by their testimony as they were assessing risk and responding to the evolving medical issue. They were attentive to Mr. Olson's needs and continuously assisted Mr. Olson to keep him comfortable and calm. This included calling EMS, insisting that they assess him and accompanying him to the hospital after the assessment was complete. Given the actions of the police officers, I do not find that the decision to keep Mr. Olson handcuffed behind the back was offensive to societal notions of fair play and decency.

[44] I find that there was not a breach of Mr. Olson's s. 7 *Charter* rights.

Conclusion

[45] On May 17, 2021, Whitehorse RCMP seized a vial of blood from the Whitehorse General Hospital that was taken from Mr. Olson on May 12, 2021, pursuant to a s. 487.1 *Criminal Code* warrant.

[46] The Crown filed an affidavit of an RCMP Forensic Alcohol Specialist who analysed the blood from Mr. Olson and found there to be between 176 and 214 milligrams of alcohol in 100 millilitres of blood ("mg%") at the time of driving. Given the

range, and giving the benefit of doubt to Mr. Olson, I find that his blood alcohol concentration was 176 mg% at the time of driving.

[47] I find Mr. Olson guilty of Count 2 on the Information for the offence contrary to s. 320.14(1)(b) of the *Criminal Code*.

[48] Count 1 on the Information for the offence contrary to s. 320.14(1)(a) of the *Criminal Code* is stayed.

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PHELPS T.C.J.