SUPREME COURT OF YUKON

Citation: *R.* v. *Johnnie,* 2009 YKSC 17 Date: 20090304
Docket S.C. No.: 08-01510
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

WAYNE JOHNNIE
A.K.A. WAYNE SILVERFOX

Before: Mr. Justice L.F. Gower

Appearances:
Kevin Komosky Appearing for the Crown
Malcolm Campbell Appearing for the Defence

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is a mandatory bail review under s. 525 of the *Criminal Code*. Mr. Johnnie seeks to be released in order that he might properly prepare for an application for a curative discharge.

[2] Under s. 525(3), I am to take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charges. That was not specifically raised as an issue by counsel, but I simply note for the record that it would seem that any delay in the matter thus far is the responsibility of Mr. Johnnie. He was arrested on the day of the offences, being June 15, 2008, and has been in custody since then. The matter was set for trial in this court in the fall of 2008, but Mr. Johnnie saw fit to discharge his defence counsel, sought new counsel, and

subsequently decided to enter guilty pleas to a number of the counts on the indictment and to indicate his intention to apply for a curative discharge. The guilty pleas were to driving while disqualified, to a breach of probation by failing to abstain from alcohol, to operating a motor vehicle while impaired and, essentially, to failing to stop a motor vehicle while being pursued by the RCMP. All of those matters arose on June 15, 2008.

[3] The other matter that I am to take into consideration under s. 525 is whether Mr. Johnnie's continued detention is justified within the meaning of s. 515(10). That section sets out what are otherwise referred to as the primary, secondary and tertiary grounds.

[4] The primary ground is whether it is necessary to ensure Mr. Johnnie's attendance in court. The Crown indicates that that is a live issue in this case because of Mr. Johnnie's criminal record, which includes a number of failure to appear convictions.

[5] I indicated during submissions that this review would not stand or fall on the primary ground, and I say that because most of the failure to appear convictions are quite dated. However, in combination with the 13 drive while disqualified convictions on Mr. Johnnie's record, which I will come to in more detail in a moment, I am not left without any concerns on the primary grounds, because those convictions all involve breaches of court orders.

[6] Turning to the secondary ground, I must consider whether Mr. Johnnie's detention is necessary for the protection or safety of the public, including any substantial likelihood that he might reoffend if released. Again, the Crown says that this is a live issue, and defence counsel says that it can be addressed by appropriate conditions.

[7] This would be an appropriate time to review the facts, which do not seem to be in any substantial dispute. On the date of Mr. Johnnie's arrest, at about one o'clock in the morning, the RCMP received a complaint that a motor vehicle was being operated in a dangerous manner in downtown Whitehorse. The vehicle was seen to be speeding and running a number of red lights. Eventually the vehicle was located parked in front of the Lizards nightclub on Main Street and 4th Avenue in Whitehorse.

[8] Two RCMP vehicles attended immediately. Constable Gagnon was in the first vehicle, and parked his vehicle perpendicular to the parked vehicle of interest, which was subsequently noted to be driven by Mr. Johnnie, with Mr. Johnnie in the driver's seat. Constable Greer parked his vehicle behind Constable Gagnon. Constable Gagnon got out of his car to approach Mr. Johnnie and, as he did so, Mr. Johnnie backed up his vehicle, at some speed, and then put it in motion to travel down towards Main Street and 4th Avenue.

[9] When he reached the intersection, there was an oncoming vehicle being driven by Corporal Pelletier. Mr. Johnnie rammed Corporal Pelletier's vehicle head-on as it was crossing into the intersection. He then put his vehicle in reverse, backed up and rammed Corporal Pelletier's vehicle a second time. Mr. Johnnie then continued to accelerate, pushing Corporal Pelletier's vehicle backwards, and eventually Mr. Johnnie's vehicle began to ride up onto the hood of Corporal Pelletier's vehicle. The vehicle being driven by Mr. Johnnie was a pickup truck. Smoke was seen to be coming out of Mr. Johnnie's tires as that was taking place.

[10] Constables Greer and Gagnon attempted to box in Mr. Johnnie's vehicle. Corporal Pelletier's vehicle was damaged to the point where he could not exit the vehicle because of the damage caused by Mr. Johnnie, but he was able to contribute to the arrest of Mr. Johnnie by spraying bear spray through the driver's open window of the pickup truck being driven by Mr. Johnnie.

[11] Eventually Mr. Johnnie was arrested. He was noted to be extremely intoxicated. He was having trouble walking, was incoherent, and was uncooperative with the RCMP.

[12] Also relevant to the secondary ground is Mr. Johnnie's criminal record, which I alluded to a moment ago. That record begins in 1973, and the last convictions are in 2005. I count a total of 69 convictions. Thirteen of those convictions are for failures to appear or breaches of probation. Ten convictions are for drinking and driving, and one conviction is for failing to provide an alcohol sample. Thirteen convictions are for driving while disqualified. In addition, Mr. Johnnie has spent two separate terms in a federal penitentiary; one for a sentence of five years and another for a sentence of four and a half years.

[13] I accept the Crown's submission that the safety of the public is a live issue in this case because of that criminal record, and in particular because of the numerous convictions for driving while disqualified.

[14] Defence counsel concedes that in this case the tertiary grounds are also at issue. Here, I must take into account whether Mr. Johnnie's detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including: one, the apparent strength of the prosecution's case; two, the gravity of the

offence; three, the circumstances surrounding the commission of the offence; and four, the potential for a lengthy term of imprisonment.

[15] Obviously the apparent strength of the prosecution's case is not in play here, as defence counsel concedes, because of the guilty pleas. Defence counsel also would seem to concede that the facts of the offences are grave. The circumstances surrounding the offences include an attempt to escape the police officers, the fact that Mr. Johnnie was highly intoxicated and was uncooperative. With respect to the potential for a lengthy jail term, the Crown indicates that it would be seeking a jail sentence in the range of two to three years.

[16] Turning to the circumstances of the offender, Mr. Johnnie is a 52-year-old First Nation male. I have the benefit of a bail supervision report, which indicates his involvement in the criminal justice system. It says that he has, in the past, supported himself by buying and selling vehicles and by cutting wood. Also, that he has a desire to apply for a curative discharge and has made an appointment with Dr. de la Mare's office on March 16, 2009, to discuss whether Dr. de la Mare is prepared to supervise him on a curative discharge. Although Mr. Johnnie indicated in his affidavit in support of today's bail review that he had been in contact with Dr. de la Mare, it appears that they have yet to speak, as there is no evidence that they have spoken, but that this appointment is set up.

[17] The BSR also indicates that Mr. Johnnie has made contact with someone in the Alcoholic's Anonymous program; that he intends to attend the White Buffalo (sic) substance treatment program offered in the community by Kevin Barr, which has a First

Nation approach to substance abuse counselling; that he has been doing very well while in custody at the Whitehorse Correctional Centre; and that he has been attending Alcoholics Anonymous meetings on a weekly basis. He has attached a memo from his case manager, Mr. Elofson, which indicates that Mr. Johnnie has been an excellent inmate while on remand to date.

[18] Mr. Johnnie has expressed an interest in residing at the Yukon Adult Resource Centre but, perhaps due to a miscommunication, the manager of that facility has indicated that they would not accept him. However, that was based on the assumption that Mr. Johnnie's plan included a condition of house arrest. His counsel informs me at this bail review that that would not be appropriate in the circumstances, as Dr. de la Mare has indicated in the past that it is important for him to see how a candidate for a curative discharge performs in the community, both with his family and in his employment, and that in order to have some freedom in that regard Mr. Johnnie should not be subject to a house arrest, but rather limited to some form of curfew. In any event, I do not have any information before me as to whether the YARC would accept Mr. Johnnie at this time on conditions other than house arrest.

[19] I do have the evidence of Sheryl Rostvantonningen, who is the girlfriend of Mr. Johnnie. She has known him for a couple of years and has been in a romantic relationship with him for about a year to a year and a half. She has a townhouse in the Riverdale area of Whitehorse and is prepared to have Mr. Johnnie reside with her. She has three children living with her in the townhouse. She has part-time employment as a custodian and is prepared to pledge $1,000, without cash deposit, as a surety. She is a sober person and does not allow drugs or alcohol to be consumed in her household and

would, in all respects, appear to be an appropriate and supportive support person for Mr. Johnnie.

[20] Mr. Johnnie has also indicated that he has attempted to get himself enrolled in a 28-day residential alcohol treatment program beginning March 29, 2009. He has had some difficulties in that regard because the person apparently in charge of enrolment felt that she had a conflict of interest and the two of them were unable to speak. Defence counsel was able to get a hold of this individual and confirm the problem of the conflict. I am advised that Mr. Johnnie has now been told that he should be making his application through the Kwanlin Dun Health Centre and that that process is underway. What I do not have before me in clear form is evidence that Mr. Johnnie is accepted into the program and would be attending it if released.

[21] Mr. Johnnie's counsel relies heavily on the decision of *R.* v. *Blanchard*, 2005 YKSC 22, a decision of Justice Veale, and says that *Blanchard* is "on all fours" with the case of Mr. Johnnie. While I acknowledge that there are some clear similarities between *Blanchard* and the case at bar, I would not go so far as to agree that it is on all fours.

[22] There are a number of reasons to distinguish *Blanchard* from the case of Mr. Johnnie. I start with the acknowledgement that in *Blanchard*, Justice Veale himself recognized that it was an "unusual" case because Mr. Blanchard could not be adequately assessed to determine if a curative discharge would be suitable for him without being released from custody so that Dr. de la Mare could assess him in a relatively unstructured environment, or at least outside of the custody of the Whitehorse Correctional Centre.

[23] The first main reason for distinguishing *Blanchard* is that the Crown in that case did not oppose the application for release, although it did have significant reservations. That is not the case here. Clearly, the Crown opposes Mr. Johnnie's release, and there is an indication in the bail supervision report that the RCMP also have significant concerns about the level of Mr. Johnnie's risk to the public if released. Corporal Pelletier was interviewed by the bail supervision officer, and he indicated his concern that Mr. Johnnie is a chronic alcoholic who does not abide by his driving prohibitions and is a high risk to reoffend, and that the Whitehorse RCMP are strongly opposed to his release. There was no such opposition that I am aware of in the *Blanchard* case.

[24] Secondly, I say that Mr. Johnnie has a significantly worse record than Mr. Blanchard. As I have noted, Mr. Johnnie has a total of 69 convictions on his criminal record. Mr. Blanchard had a total of 27. Although I acknowledge that the number of drinking and driving and failing to provide samples was roughly equivalent, the number of driving while disqualifieds by Mr. Blanchard were limited to five. Mr. Johnnie has over twice that, being 13 in number.

[25] Thirdly, Mr. Blanchard had been on judicial interim release for a significant period of time prior to being remanded into custody upon his convictions, and therefore had already demonstrated an ability to Justice Veale to remain sober, subject to a slip in November of 2004. As I understand it, Mr. Blanchard was noted to have been sober since June 2004. He had a slip in November of that year, and then took a 28-day inpatient alcohol treatment program in January of 2005. Mr. Blanchard had been residing at the YARC, as I understand it, so he was in a semi-structured environment, was not under house arrest and was subject only to a curfew, as I recall. But the upshot

of all of this is that he did have the ability to demonstrate his ability to remain sober while having somewhat restricted liberty.

[26] Prior to all of that, Mr. Blanchard was noted to have taken a residential treatment program for his alcoholism in Kitwanga, British Columbia, and had remained sober for a period of seven months. There is no such similar circumstance in Mr. Johnnie's case.

[27] Further, after completing his alcohol and drug treatment program in January of 2005, Mr. Blanchard was noted to be an active participant and had developed his own after-care program addressing future goals, high-risk situations and lifestyle changes. Again, nothing similar can be said of that nature for Mr. Johnnie.

[28] In addition, Mr. Blanchard had been attending weekly sessions with an addictions counsellor to work on his recovery from alcoholism and planning for maintaining sobriety on his return to his home community. Mr. Johnnie, because he has been incarcerated, has not had that same opportunity.

[29] Further, Mr. Blanchard had actually met with Dr. de la Mare, and Dr. de la Mare had indicated a willingness to supervise the curative discharge application. That is something that Mr. Johnnie has yet to do, and in fact I have no evidence as to whether Dr. de la Mare would even be willing to take on a supportive role in Mr. Johnnie's application. All I know is that an appointment is set.

[30] Also significant is that Mr. Blanchard had potential employment lined up upon his release, and in the subsequent decision by Justice Veale on the actual curative discharge, *R.* v. *Blanchard*, 2006 YKSC 35, that employer was described as being "very

supportive." I say that is important because for Mr. Blanchard to be expected to show up for work on a daily basis, week in week out, for another employer was not only a means for Dr. de la Mare to assess his good faith and his potential candidacy for a curative discharge, but also a means of monitoring Mr. Blanchard's performance on a daily basis. There is no such plan before me for Mr. Johnnie. All I have is an indication that he is generally self-employed as a wood cutter and as a mechanic, and that, in fact, he does not have any particular plans to seek employment upon release, in anticipation of attending an alcohol program.

[31] The case of *R.* v. *Hall*, [2002] 3 S.C.R. 309, deals with the tertiary grounds in s. 515(10)(c). I am reading here from the annotations that in that case it was noted in unusual cases it is essential to have available a means to deny release because public confidence is essential to the proper functioning of the bail system and the justice system as a whole. The provision is such that release may only be refused if the judge is satisfied that in view of the four specified factors, which I reviewed earlier, and related circumstances, a reasonable member of the community would be satisfied that refusal of release is necessary to maintain confidence in the administration of justice.

[32] In my view, those circumstances pertain to Mr. Johnnie. In particular, I note that the author of the bail supervision report, Ms. Casselman, says at the last page:

> "In reviewing the file information, the writer noted many instances where Mr. Johnnie said he was going to abstain, abide by his no driving clause and continue with counselling. Although he was able to stop drinking for short periods of time, over the years his overall performance has been poor. The current plan does not appear to be any different than [the] ones he has attempted in the past, except that the players involved are different. Mr. Johnnie did express

> motivation to do better, but he has said the same thing many times in the past."

[33] I say all this acknowledging defence counsel's submission that sometimes the best approach to the worst offender, in terms of drinking and driving, is to apply for a curative discharge. But the fact that one intends to apply does not automatically entitle an accused to favourable consideration in terms of bail. The provisions in s. 515(10) must still be taken into consideration, and having taken all of those factors into consideration, I am satisfied that the continued detention of Mr. Johnnie is justified.

[34] Have I omitted anything, counsel?

[35] MR. CAMPBELL: My Lord -- Madam Clerk, can you advise when the next Supreme Court fix date is?

[36] THE CLERK: Yes. There is March the 17th, My Lord, and March the 31st.

[37] MR. CAMPBELL: If this could go to the 17th at 1:30; is it?

[38] THE CLERK: Yes, it is 1:30.

[39] MR. KOMOSKY: Is that fix-date disposition?

[40] MR. CAMPBELL: To be spoken to.

[41] THE COURT: I should just amend, for the record, something that I said earlier, and that was in relation to the distinguishing features between *Blanchard* and Mr. Johnnie. In the bail supervision report filed for June 18, 2008, there is a

reference to Mr. Johnnie having attended substance abuse counselling with Lynne Moylan-White. However, there are no details there or anywhere else that I have been able to find as to when that was, or the number of sessions which were undertaken.

[42] MR. CAMPBELL: My Lord --

[43] THE COURT: So you wanted this to go when, Mr. Campbell?

[44] MR. CAMPBELL: To the 17th of March.

[45] THE COURT: The matter will be spoken to on March 17th at 1:30.

[46] MR. CAMPBELL: 1:30. And -- yeah, that's fine.

[47] THE COURT: Is that everything?

[48] MR. CAMPBELL: My Lord, in your decision, and I realize the door is closed, but you made the one revision. I'd also indicate that the affidavit does indicate that Mr. Blanchard had been in contact with Dr. de la Mare, at para. 5, prior to making his appointment.

[49] THE COURT: Yes. My comment was whether that was actually the case, or whether he had just made the appointment to speak with Dr. de la Mare.

[50] MR. CAMPBELL: No, no. He's been in contact with Dr. de la Mare.

[51] THE COURT: All right. I thank you for clarifying that.

[52] MR. CAMPBELL: He was -- I believe he got a temporary absence from the jail to go down to meet him.

[53] THE COURT: Well, then that should have been in the affidavit, Mr. Campbell, because it is somewhat ambiguous. I read that as being that he had been in touch with the clinic and made the appointment.

[54] MR. CAMPBELL: No, no. He's been in contact with Dr. de la Mare himself.

[55] THE COURT: Well, if he had had an in-person meeting with Dr. de la Mare on a temporary absence, then that is something that should have been in the affidavit.

[56] MR. CAMPBELL: I thought that was clear from the affidavit, but perhaps it could've been clearer.

[57] THE COURT: Well, I mean there were a few things with the affidavit, such as the AA sponsor, which was subsequently explained to have been a misunderstanding, so I was not entirely clear whether the same confusion might have been the case with the meeting with Dr. de la Mare. But maybe it is my responsibility, and if it is, I apologize for that.

[58] THE CLERK: Is Mr. Johnnie required, My Lord, on the 17th?

[59] THE COURT: Do you want your client here?

[60] MR. CAMPBELL: No, I'll appear as agent. I believe there's been a designation filed.

[61] THE CLERK: Yes.

[62] MR. CAMPBELL: On the 3rd of December.

[63] THE COURT: Just to follow up on that point, Mr. Campbell. I do not know from this statement in the affidavit whether Dr. de la Mare has indicated a willingness to assist Mr. Johnnie, and that is, it would seem to me, a critical piece of information. If the two of them have had a face-to-face conversation, it even underscores more the importance of putting that information in the affidavit. That is a critical piece of information that is certainly not before the Court. All I know is that they are about to have a meeting on the 16th to discuss that matter, and that is why I made the comments I did.

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GOWER J.