Citation: *R.* v. *Boulanger*, 2008 YKTC 22 Date: 20080303
Docket: T.C. 06-00781
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

REGINA

v.

CANDICE MARIE BOULANGER

Appearances:
Angie Paquin Counsel for Crown
Emily Hill Counsel for Defence

RULING ON *VOIR DIRE*

[1] LILLES T.C.J. (Oral): Ms. Boulanger is before the court having entered not guilty pleas to the following charges: One, on or about the 3rd of March 2007, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that she, while her ability to operated a motor vehicle was impaired by alcohol or a drug, did operate a motor vehicle contrary to s. 253(a) of the *Criminal Code*. Count 2, on or about the 3rd of March, 2007 at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that she, having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, did operate a motor vehicle contrary to s. 253(b) of the *Criminal Code*.

[2] At this stage of the proceedings, the admissibility of the Certificate of Qualified Technician has been challenged by Ms. Boulanger. The evidence set out following, was received in a *voir dire*. Constable McCarty testified that he observed a vehicle leave the Casa Loma parking lot onto Wann Road in the City of Whitehorse. As the vehicle was travelling at a high rate of speed, he decided to follow it. He made observations of the manner of driving that caused him to stop the vehicle.

[3] Constable McCarty approached the vehicle and spoke to the female driver, whom he identified as the accused. He observed the passenger in the passenger seat and detected a moderate odour of alcohol emanating from the vehicle. When he asked the driver to produce her driver's licence, her words were somewhat slurred, but he could not tell whether this was a result of alcohol consumption or a speech impediment. Ms. Boulanger told the constable that she did not have her driver's licence with her and that it was at her home, which was close by. Although he had a suspicion that she may have possibly consumed alcohol, he allowed her to drive the short distance to her home.

[4] Constable McCarty parked his police cruiser behind Ms. Boulanger’s vehicle where he was in a position to observe her exit her vehicle. As Ms. Boulanger stepped out of her vehicle, she appeared to slip on the snow and then stumbled towards the door of her trailer. She lost the cigarette that she was smoking and then walked along the side of her trailer displaying “unsure balance.” At the door to her home she stumbled and kicked the door frame. She searched for her house key but was unable to locate it. As Constable McCarty observed Ms. Boulanger, he formed the opinion that she was impaired. He asked her to return to his vehicle. As he did not have an

approved screening device, hereafter referred to as an ASD, with him, he used his radio to locate one. Constable McCarty determined that Constable Gagnon was in the vicinity and asked him to deliver an ASD to him.

[5] Constable McCarty exited the vehicle, told Ms. Boulanger that she was under investigation for impaired driving and placed her in the back of the police vehicle. When Constable Gagnon delivered the ASD, Constable McCarty made a demand for a breath sample by reading from a card. Ms. Boulanger provided a sample which registered a "fail."

[6] Constable McCarty arrested Ms. Boulanger for the impaired operation of a motor vehicle, provided her with her *Charter* rights and the police warning, and transported her to the police detachment, where, in due course, she provided two breath samples.

[7] The defence position is that the Certificate of Qualified Technician that records the alcohol level in Ms. Boulanger's blood, as measured by the breathalyzer instrument, should not be admitted because the ASD sample was not taken "forthwith" as required by s. 254(2) of the *Criminal Code*.

[8] It is necessary, therefore, to examine the relevant events more closely and to ascertain exactly when they occurred. Based on Constable McCarty's evidence, I can make the following findings of fact:

a) Constable McCarty observed Ms. Boulanger on the Alaska Highway a few minutes before 3:50 p.m. on March 3, 2007.

b) Constable McCarty detained Ms. Boulanger at her home around 3:51 p.m.

c) Constable McCarty used his car radio to contact Constable Gagnon and asked him to deliver an ASD just prior to 3:51 p.m.

d) Constable Gagnon delivered the ASD to Constable McCarty at 4:05 p.m.

e) Constable McCarty made the screening device demand at 4:06 p.m., and the breath sample was provided by Ms. Boulanger immediately thereafter.

[9] As can be seen from the events set out above, there was a delay of 15 minutes between the time that Constable McCarty formed the opinion that Ms. Boulanger had alcohol in her body and when he made the demand to provide a breath sample into the ASD. That delay occurred because Constable McCarty did not have an ASD in his vehicle and had to contact another officer in the vicinity to deliver the ASD to him. While Constable McCarty waited for the ASD to be delivered, he prepared his investigation notes. There was no suggestion that these notes had to be made before the ASD demand was made. I am satisfied that the unavailability of the ASD was the only reason for the 15 minute delay in making the breath demand.

The Law

[10] *R*. v. *Bernshaw*, [1995] 1 S.C.R. 254, is the seminal decision for interpreting the meaning of forthwith in s. 254(2) of the *Criminal Code.* This case decided that the police need not wait 20 minutes before taking a breath sample in an ASD; although doing so would help ensure that where the subject had recently had a drink, regurgitated, or vomited, any mouth alcohol would have been dispersed.

[11] In the course of its decision, the Supreme Court analyzed the meaning of s. 254(2) from both practical and policy, as well as constitutional perspectives. I will consider the constitutional considerations first.

[12] The analysis by the majority, written by Sopinka J., and that of the minority, written by Cory J., are in substantial agreement. It is recognized that to the extent that s. 254(2) of the *Code* involves a detention, the absence of an opportunity to retain counsel violated s. 10(b) of the *Charter.* Nevertheless, it was justified under s. 1 of the *Charter* because it was urgent that the breath sample be obtained quickly in order to be effective. As stated by Cory J., at paragraph 26:

> …The right to retain counsel was incompatible both with the effective use of the ALERT device and with the purpose of demonstrating a police presence which would convince drinking drivers that there was a high probability that they would be quickly and readily detected. The section's use of the word "forthwith" in the context of a roadside screening test clearly indicated that there was to be no opportunity granted to a driver to call a lawyer….

[13] The potential conflict between the *Charter* right to counsel and delay in administering the ASD was considered more recently in *R*. v. *Woods*, [2005] S.C.J. 42, beginning at paragraph 14:

> The constitutional obstacle is no easier for the Crown to overcome. Section 254(2) depends for its constitutional validity on its implicit and explicit requirements of immediacy. This immediacy requirement is implicit as regards the police demand for a breath sample, and explicit as to the mandatory response: the driver must provide a breath sample "forthwith".

Paragraph 15:

> Section 254 (2) authorizes roadside testing for alcohol consumption, under pain of criminal prosecution, in violation of ss. 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms.* But for its requirement of immediacy, s. 254(2) would not pass constitutional muster. That requirement cannot be expanded to cover the nature and extent of the delay that occurred here.

[14] The Supreme Court, in considering *Woods, supra*, quoted with approval from *R*. v. *Cote,* 70 C.C.C. (3d) 280, Ontario Court of Appeal, a decision of Arbour J.A., as she then was. The facts of *Cote* are summarized in the head note as follows:

> The accused was charged with refusing to provide a breath sample for analysis in an approved screening device pursuant to a demand made under s. 254(2) of the Criminal Code. The accused was stopped by a police officer. The officer smelled alcohol on the accused's breath and made a demand that the accused provide a sample of his breath "forthwith". The officer did not have the screening device with him and so he required the accused to accompany him to the police station. It took approximately nine minutes to drive to the police station and the accused was then required to wait for another five minutes until the officer was ready. At this time, the accused refused to supply breath samples. At no time was the accused informed of his right to retain and instruct counsel. The accused was convicted at trial and his appeal to the summary conviction appeal court was dismissed. On further appeal by the accused to the Court of Appeal, held, the appeal should be allowed and an acquittal entered.

[15] In particular, the Supreme Court of Canada adopted the following paragraph from *Cote, supra*:

> If the accused must be taken to a detachment, where contact with counsel could more easily be accommodated than at the side of the road, a large component of the rationale in *Thomsen* disappears. In other words, if the police officer is not in a position to require that a breath sample be provided by the accused before any realistic opportunity to consult counsel, then the officer's demand is not demand made under s. 238(2) [as it then was]. The issue is thus not strictly one of computing the number of minutes that fall within or without the scope of the word "forthwith". Here, the officer was ready to collect the breath sample in less than half the time it took in *Grant*. However, in view of the circumstances, particularly the wait at the police detachment, I conclude that the demand was not made within s. 238(2). As the demand did not comply with s. 238(2), the appellant was not required to comply with the demand and his refusal to do so did not constitute an offence.

[16] It is important to be reminded of the fact that since *R*. v. *Therens,* [1985] 1 S.C.R. 613, the right to counsel has been considered to be one of the most important in a free and democratic society.

[17] As I understood *Cote*, if the ASD cannot be administered forthwith, the resulting delay may trigger the s. 10(b) right to retain and instruct counsel without delay and to be informed of that right. As this case demonstrates, the number of minutes of delay need not be great - in *Cote*, it was 14 minutes. Rather, the question is whether in all the circumstances, there was a realistic opportunity to consult counsel during the period of delay. If there was, the accused's s.10(b) rights come into play and must be respected and the demand ceases to be a valid demand pursuant to s. 254(2) of the *Code*.

[18] *R*. v. *Bernshaw, supra*, also addressed practical and policy consideration. In particular, the Supreme Court considered whether a police officer can wait 15 minutes to administer the ASD to ensure the proper functioning of the machine. The Court had in mind those instances where the officer was actually aware that the driver had had a recent drink or had recently burped or regurgitated. In such instances, there is a real danger that the ASD would provide inaccurate elevated readings. The Supreme Court stated, at paragraph 71:

> …After reviewing the jurisprudence, Arbour J.A. stated that whether or not one can delay 15 minutes cannot be determined in the abstract. If the police could never wait 15 minutes, then the officer would be faced with the choice of disregarding the "fail" result due to the suspicion of its unreliability, or taking the suspect for a breathalyzer test and overlooking the concern that the screening result may have been falsely high. On the other hand, Arbour J.A. noted that if the officer is entitled to wait 15 minutes before administering the test, this unduly expands the detention without access to counsel.

[19] Arbour J.A. concluded, as follows at page 711, and I should add this is all quoting from the Supreme Court of Canada judgment:

> In my view, a police officer cannot delay the taking of a breath sample, when acting pursuant to s. 254(2) of the Criminal Code, unless he or she is of the opinion that a breath sample provided immediately will not allow for a proper analysis of the breath to be made by an approved screening device. The officer is not required to take a sample that she or he believes is not suitable for a proper analysis. The expression "proper analysis" incorporates an element of accuracy…. If there are facts which cause the officer to form the opinion that a short delay is required in order to obtain an accurate result, I think that the officer is acting within the scope of the section in delaying the taking of the breath sample. In such a case, as I indicated earlier, I do not think that it matters whether the officer postpones making the demand or postpones administering the test after having made the demand.

The Supreme Court went on to say:

> Therefore, because in that case there was evidence that Pierman might have consumed alcohol just prior to being stopped by the police, it was legitimate to delay the test. Whereas, in Dewald's case, the police had no information as to when the accused last consumed alcohol and so delaying the test was not justifiable. Arbour J.A. held that the police can only detain the suspect for an extra 15 minutes when there is some factual basis upon which to suspect that the screening device would yield an inaccurate result.
>
> I adopt the flexible approach taken by Arbour J.A. In my view, it is in accord with the purpose of the statutory scheme and ensures that a police officer has an honest belief based on reasonable and probable grounds prior to making a breathalyzer demand. Waiting 15 minutes is permitted under s 254(2) of the Code when this is in accordance with the exigencies of the use of the equipment. This applies when an officer is aware of the potential inaccuracy in the particular case.

Paragraph 74:

> Although there is no doubt that the screening test should generally be administered as quickly as possible, it would entirely defeat the purpose of Parliament to require the

> police to administer the screening test immediately in circumstances where the results would be rendered totally unreliable and flawed. The flexible approach strikes the proper balance between Parliament's objective in combating the evils of drinking and driving, on the one hand, and the rights of citizens to be free from unreasonable search and seizure. I do not believe that the matter is advanced by quoting statistics. Although we all agree that Parliament has every reason to vigorously pursue the objective of reducing the carnage on our highways, that objective is not advanced by subjecting innocent persons to invasions of privacy on the basis of faulty tests. I do not believe that this is what Parliament intended in enacting s. 254 of the Criminal Code.

[20] According to this reasoning, where the police officer delays administering the ASD for no longer than is necessary to ensure that it will give a proper analysis, as required by s. 254(2), the sample is still provided "forthwith". Where the officer knows that the driver has burped or regurgitated, a 15 minute delay in taking the breath sample would still be consistent with s. 254(2) of the *Code*. Such a delay would not trigger the s. 10(b) right to counsel.

[21] The facts in *R*. v. *Danychuck*, 183 C.C.C. (3d) 337, Ontario Court of Appeal, provided another similar example. In that case, there was a modest delay while the officer turned on, warmed up, and tested the ASD. The delay was necessary to ensure a proper reading.

[22] I would add that when the right to counsel is triggered upon detention, the onus is on the police to advise the detained person of his rights and to facilitate access to counsel. This did not occur on the facts of this case.

[23] In the case at bar, I find that the demand and the provision of the breath sample did not comply with s. 254(2). The detention triggered Ms. Boulanger's s. 10(b) rights,

which were breached. It resulted in the taking of breath samples which constituted an unreasonable search and seizure within the meaning of s. 8 of the *Charter*. It remains to be decided whether, pursuant to s. 24(2) of the *Charter*, these facts should preclude the admissibility of the Certificate of Qualified Technician.

[24] The Crown relies on the Supreme Court of Canada decision in *R*. v. *Dewald,* [1966] 1 S.C.R. 68. The facts of *Dewald* are set out in *R*. v. *Pierman*, [1994] 19 O.R. (3d) 704, Ontario Court of Appeal. In the absence of any information about the driver having a recent drink of an alcoholic beverage, or burping, or regurgitating, the police had a policy of waiting 15 minutes before administering the ASD.

[25] This delay was not authorized by the *Criminal Code* and resulted in an unlawful detention, a breach of the accused's s. 10(b) *Charter* rights, and an unlawful search and seizure pursuant to s. 8 of the *Charter*. It is apparent that the police decision in *Dewald* to delay administering the ASD was to ensure sample integrity, meaning the sample was not contaminated by mouth alcohol.

[26] On appeal to the Supreme Court of Canada, the Court acknowledged that there was a breach of the appellant's rights under the *Charter*, but dealt with the s. 24(2) issue summarily, merely stating:

> With respect to s. 24(2), we are of the opinion that in all the circumstances, the admission of evidence did not render the trial unfair. The breach of the Charter was technical and the police officer acted in good faith. The admission of the evidence would not bring the administration of justice into disrepute.

[27] In the absence of reasons, this conclusion must be confined to the unique facts in *Dewald, supra*. As observed earlier in discussing *Bernshaw, supra*, delay in

administering the ASD may be permitted where it occurs in order to protect the integrity of the sample. In *Dewald*, the delay was also motivated by concern over sample integrity.

[28] To put it another way, the officer delayed taking the sample to ensure that there was no residual mouth alcohol that could result in a higher ASD reading which, in turn, could result in the unnecessary further detention and arrest of the driver. These circumstances justify the finding that the *Charter* breach was technical and the police officer was acting in good faith.

Conclusion

[29] On the facts of the case at bar, a delay of 15 minutes occurred before the ASD could be administered due entirely to the fact that Constable McCarty had to call for another officer to deliver a device to him. This was not a case where the ASD was present and the delay was necessary to "enable a proper analysis". Moreover, Constable McCarty knew, as soon as he detained Ms. Boulanger, that there would be a delay of up to 15 minutes before the ASD could be delivered. He did not advise her of her right to counsel, nor did he facilitate access to counsel.

[30] I note that in our society today cell phones are prolific. He did not advise her that if she had a cell phone she could use it to contact counsel. The constable described using a cell phone and a "phone" from his car to locate an ASD. When questioned, he said it was attached to the vehicle and if he passed it to Ms. Boulanger in the back seat he would overhear her conversation with her lawyer. That, of course, is not permissible, that is to say, overhearing the conversation.

[31] I do not accept that explanation. The officer could have stepped away from the vehicle and still kept Ms. Boulanger in sight, if she chose to contact counsel.

[32] Finally, Ms. Boulanger was detained immediately in front of her residence. I accept that she had trouble locating her house key when she was detained by Constable McCarty. The evidence did not establish that she had lost her key. It may have been possible for her to use the telephone in her home.

[33] In the case at bar, the evidence merely indicates that Constable McCarty did not have an ASD in his police cruiser. No information was provided why he did not have it. In the absence of such information, I am not able to say that the delay was merely technical or that the officer was acting in good faith. I do not find the Supreme Court of Canada decision in *Dewald, supra*, applicable.

[34] The test to be applied in s. 24(2) of the *Charter* is set out in detail in *R*. v. *Collins,* [1987] 1 S.C.R. 265. I acknowledge that the test to be applied is whether the evidence could bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate, and fully apprised of the circumstances of the case. I am not going to review all of the criteria set out in *Collins*. As indicated earlier, Ms. Boulanger's s. 10(b) rights have been infringed by her detention. The breathalyzer samples and readings constitute conscripted evidence which would, in my opinion, on the facts of this case, make the trial unfair.

[35] I am mindful of the fact that s. 254(b) provides a shortcut for the police that, except for the application of s. 1 of the *Charter,* would be unconstitutional. While drinking and driving offences are serious and cause much harm and injury on our

highways, I note that there was no accident or injury in this case, and although the Crown alleges high readings, I am satisfied that the admission of the Certificate of Qualified Technician, to the extent that it resulted from the fail reading on the ASD, could bring the administration of justice into disrepute. For that reason, my ruling on this *voir dire* is that the certificate is not admissible.

[36] Ms. Paquin, that is the ruling on the *voir dire*, and I should ask you now, are you in a position to continue the trial or to call additional evidence outside the *voir dire*?

[37] MS. PAQUIN: There will be no additional evidence for the Crown. Crown case is closed.

[38] THE COURT: Thank you. In the circumstances, for the reasons indicated in my decision, the charge is dismissed.

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LILLES T.C.J.