Citation: *R.* v. *Carlick*, 2016 YKTC 7

Date: 20160323
Docket: 15-10030
15-10030A
Registry: Watson Lake

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Faulkner

REGINA

v.

WALTER JOSEPH CARLICK

Appearances:
Eric Marcoux — Counsel for the Crown
Stanley J. Tessmer — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Walter Joseph Carlick is charged with refusing a demand by a peace officer to provide samples of breath for analysis in an approved screening device pursuant to s. 254(2) of the *Criminal Code*.

[2] Mr. Carlick applies, pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* for a judicial stay, alleging that he was arbitrarily detained.

[3] On June 14, 2015, Constables Sauve and Maloff of the Watson Lake RCMP detachment set up a check stop along the Alaska Highway between Watson Lake, Yukon and Lower Post, British Columbia. The location was on the Yukon side of the border. At 00:20 hours, Cst. Sauve stopped a pickup truck proceeding southbound toward Lower Post. The accused was the driver. When Mr. Carlick lowered the driver's

side window, Cst. Sauve noticed an odour of alcohol coming from the vehicle. The accused and his passenger at first denied having anything to drink, but then Mr. Carlick allowed that he had consumed one drink.

[4] Mr. Carlick was asked to step from the vehicle. His movements appeared slow and deliberate. Cst. Sauve made an approved screening device demand which Mr. Carlick refused. No issue is taken with the grounds for, or wording of, this demand.

[5] At 00:28 Cst. Sauve advised the accused that he was under arrest for refusal and placed Mr. Carlick in the rear seat of the police vehicle. Mr. Carlick was not hand-cuffed, but there were no rear door handles and Mr. Carlick was unable to exit. Since the charge gave the police authority to impound the vehicle pursuant to s. 235(1) of the *Motor Vehicles Act*, RSY 2002, c. 153, Cst. Sauve elected to do so and radioed for a tow truck. Cst. Maloff departed the scene in his police car to transport Mr. Carlick's passenger to where she had requested to go. Cst. Maloff then returned to the scene.

[6] At 00:54, the tow truck arrived. Cst. Sauve then drove Mr. Carlick to the Watson Lake police detachment arriving shortly after 01:00. Mr. Carlick was offered, and declined, the opportunity to contact counsel. Cst. Sauve proceeded to fingerprint the accused and to prepare the paperwork related to the matter, consisting of a Promise to Appear, a vehicle impound notice, and a Notice of Intention to Seek Greater Punishment. During a portion of this time, Mr. Carlick was held in a locked cell. Mr. Carlick was released at 02:02 and Cst. Sauve drove Mr. Carlick to his home in Lower Post.

[7] Cst. Sauve testified that it is his invariable practice to arrest those persons who refuse a roadside screening demand. He said that it was more convenient for the

accused if he prepared and served all the documents, and took fingerprints, then and there, rather than having the accused return to the detachment later.

[8] Cst. Sauve also said that he has not been provided with paper forms that would allow him to release at the roadside. Rather, it is necessary to return to the detachment and prepare the forms using templates on the detachment computers.

[9] Cst. Sauve acknowledged that it was not necessary to arrest the accused for any of the reasons enumerated in s. 495(2) of the *Code*. In particular, he had no concerns with a continuation or repetition of the offence. He knew Mr. Carlick and had no concerns that he would fail to appear in court.

[10] It is on these facts that the accused makes his application for a stay on the basis that he was arbitrarily detained in breach of s. 9 of the *Charter*.

[11] I should add that there is no dispute as to what occurred at the roadside or at the detachment. Substantially all of the proceedings at the roadside were captured on an audio and video recording device, and the recording was played during the *voir dire*. There were also recordings of what transpired at the detachment. These were not entered in evidence but were available to the parties.

[12] The first question is whether or not Mr. Carlick was arbitrarily detained. Mr. Carlick's claim is that his detention was arbitrary from some point soon after he was advised he was being charged with refusal. He says that he should not have been arrested but released at the roadside, either with an Appearance Notice or, alternatively, released by the officer with the intention of later swearing an Information and issuing a Summons to the accused.

[13] In my view, no objection can be taken to Cst. Sauve's decision to detain Mr. Carlick in the police car until the tow truck arrived to take possession of the accused's vehicle.

[14] Although it appears that Mr. Carlick's truck was parked off of the travelled portion of the highway, it is generally the case that vehicles left on or near a highway can create a hazard for other motorists. Indeed, it is an offence under s. 180 of the *Motor Vehicles Act* to park a motor vehicle on a highway shoulder except in emergent circumstances. Moreover, having taken possession of the vehicle, the police had a duty to safeguard it against loss or damage. See *Wilkinson v. Watson Lake Motors Ltd*., 2010 YKSC 48.

[15] The roadside detention was, more or less, inevitable as Cst. Maloff had left the scene. Moreover, releasing Mr. Carlick while his vehicle was still at hand would have risked the commission of further offences even though the police had taken possession of one set of keys for the vehicle. Finally, releasing Mr. Carlick in the wee hours of the morning on a rural stretch of highway, some distance from either Watson Lake or Lower Pose with no immediate means of transport was hardly a viable option. Cst. Sauve would have justly faced criticism had he done so.

[16] Accordingly, the real question is whether or not it was permissible to then take the accused to the police detachment and detain him further while he was fingerprinted and the paperwork prepared and served.

[17] I note at the outset that the offence of refusing a roadside screening device demand is somewhat unique. The offence is complete upon the refusal and further detention and investigation may be unnecessary.

[18] This is in contrast to a case where the accused is under investigation for impaired driving or "over 80." In such cases, there is a clear need to detain the driver in order to further the investigation, including the obtaining of breath or blood samples, and the prevention of further offences (*R. v. Cayer*, 28 O.A.C. 105.)

[19] However, even in a case of a roadside screening demand refusal, it may be that the arrest and detention of the accused is similarly justified in order to prevent the commission of further offences. The refusal may increase the concern that the accused is, in fact, impaired. As well, it is prudent for the police to undertake a reasonable assessment of the accused's functional sobriety recognizing that it is not in the best interests of a drunk person to release him or her (*R. v. Hardy*, 2015 MBCA 51.)

[20] However, the officer in this case did not cite any such concerns.

[21] As I have already indicated, it was reasonable to detain Mr. Carlick at least until his vehicle had been secured, but as the officer concedes, none of the reasons for further detention enumerated in s. 495(2) of the *Code* applied. Accordingly, he ought to have been released. The provisions of s. 495(3) which deem the arrest to be lawful, even though the s. 495(2) pre-conditions were not present, do not in my view, "*Charter*-proof" the detention.

[22] Since Cst. Sauve had a blanket practice or policy of arresting and detaining all those in circumstances similar to Mr. Carlick until fingerprinting and paperwork were completed, it can be said that the detention was arbitrary during the approximately one hour period after the accused's vehicle was secured.

[23] This does not mean that all detentions resulting from the application of pre-existing policy or practice are arbitrary. The policy may be based on valid considerations which make arrests pursuant to such policy justified in the public interest as required by s. 495(2).

[24] Here, however, no such reasons are advanced for the policy employed here. It was simply the most expeditious and convenient. I note, as well, that the Crown did not attempt to argue for the validity of the detention. In the circumstances, I conclude that Mr. Carlick's detention was arbitrary contrary to s. 9 of the *Charter* and there is thus a basis for making an application for a remedy under s. 24(1).

[25] The remedy Mr. Carlick seeks is a stay of proceedings on the charge he faces.

[26] A stay of proceedings is designed to remedy or repudiate abuse of process and so maintain the repute of the administration of justice. However, the need to ensure the continued vigour of the checks and balances in the criminal justice system must be weighed against the public interest in having all charges dealt with on their merits (*R. v. Regan*, 2002 SCC 12 and *R. v. Grant*, 2009 SCC 32.)

[27] A stay is the most drastic remedy available and should only be invoked "in the clearest of cases;" where no other remedy would suffice, and where the state conduct is so offensive that proceeding to trial in the face of such conduct would seriously harm the integrity of the justice system. It is a very high threshold.

[28] In support of the application for a stay, counsel for Mr. Carlick referred to a number of authorities from Alberta and British Columbia where stays were entered in cases arguably similar to the present. I did not find these authorities persuasive. It

appears to me, with respect, that the judicial consciences in these cases were rather too easily shocked, and the leap from "clear breach" to "clearest of case" too easily made. Moreover, the circumstances of these cases are generally distinguishable as the length of detention was longer, the conditions more oppressive, or both. Finally it must be noted that *R. v. Herter*, 2006 ABPC 221, one of the cases Mr. Tessmer relied on was, in fact, reversed on appeal (*R. v. Herter*, 2007 ABQB 756.)

[29] I prefer the view the court took in *R. v. Sparrow*, 2006 ABQB 284. There, Sanderman J. said that suggesting that a stay should be entered in circumstances such as these "cannot be seriously entertained."

[30] While the accused was detained, the period of time was relatively brief, lasting approximately one hour, or an hour and a half if one includes the detention at the roadside. Mr. Carlick was not handcuffed or mistreated. He was in a locked cell for only a brief period. Considering this was a rural detachment in the early hours of the day it was not unreasonable given the officer needed to turn his attention to the preparation of documents.

[31] The only realistic alternative to what occurred here would have been to release Mr. Carlick from the roadside with an Appearance Notice[1]. Even if that had been done, there would still have been a period of detention while the Appearance Notice was prepared and served. Mr. Carlick would then have been required to attend the detachment as a later date for fingerprinting and to deal with the police for service of documents.

[1] Given that the officer had the alleged offender at hand, the option of releasing Mr. Carlick without charge, then attending before a Justice of the Peace to swear an Information and seek and serve a Summons, is simply not realistic. Indeed, the cumbersome nature of that process is why the Appearance Notice was invented.

[32] After Mr. Carlick's release Cst. Sauve drove the accused home. The officer's conduct was polite throughout.

[33] An unnecessary restraint on liberty should never be trivialized, but what happened in this case was, in the realm of *Charter* breaches, at the very lowest end of the scale. No evidence was obtained and the right to make full answer and defence was unimpaired.

[34] What occurred here falls far short of egregious state action that would call for the drastic remedy of a stay.

[35] The application is dismissed.

[36] It should be noted that Mr. Carlick's Notice of Application also included the intriguing allegation that serving the Notice of Intention to Seek Greater Punishment constituted a breach of s. 7 of the *Charter*. This allegation was abandoned during argument and need not be considered further.

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FAULKNER, T.C.J.