Citation: *R. v. Densmore*, 2016 YKTC 65

Date: 20161116
Docket: 15-00339
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

LIS DENSMORE

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Shannon Prithipaul (by telephone) — Counsel and Agent for the Defence

RULING ON *CHARTER* APPLICATION

[1] CHISHOLM J. (Oral): Ms. Lis Densmore is charged with driving her motor vehicle while impaired by alcohol; and while having a blood alcohol level greater than the legal limit. The alleged offences occurred near the City of Whitehorse, Yukon, on August 8, 2015.

[2] The defence alleges breaches of Ms. Densmore's *Charter* rights, pursuant to ss. 8, 9, and 10, and seeks a remedy to exclude evidence, pursuant to s. 24(2) of the *Charter*. The defence also seeks exclusion of the screening device and the breathalyzer results, pursuant to s. 24(2).

[3] The Crown called the investigating officer in this *voir dire* and the defence called no evidence.

[4] The investigating officer was travelling southbound on the South Klondike Highway when he noted a vehicle in front of him travelling in the same direction. The signal light of the vehicle was activated, indicating a right-hand turn off the highway. The officer noted that the vehicle had the signal light activated quite a ways before the turn off and that the vehicle was travelling slowly.

[5] The officer instigated a traffic stop. Ms. Densmore was the driver of the vehicle. There were no passengers, although she had two dogs in the back of the vehicle. The officer suspected she had alcohol in her body, based on their interaction, and made an approved screening device demand. Ms. Densmore complied and blew a fail result.

[6] The officer subsequently arrested her for impaired operation of a motor vehicle. He mentioned that she would be able to contact a lawyer. He then agreed to transport her dogs to her home, located a relatively short distance away.

[7] Approximately 20 minutes after her arrest, the officer formally provided Ms. Densmore her right to counsel, the supplementary police warning, and the breathalyzer demand. He offered her the use of a cell phone but she replied that she would contact her lawyer at the police detachment.

[8] The officer attempted contact with Ms. Densmore's lawyer but was unsuccessful. She subsequently provided breath samples.

[9] The defence alleges that the investigating officer lacked the reasonable suspicion to believe that Ms. Densmore had alcohol in her body, making the approved screening device test an unreasonable search and seizure.

[10] The defence submits that the officer lacked grounds to arrest her for impaired operation of a motor vehicle, as he had not concluded, even with the screening device fail result, that her ability to operate a motor vehicle was impaired by alcohol. In both situations, she was therefore unlawfully detained.

[11] The defence further submits that the breathalyzer demand was invalid, as it was not made as soon as practicable, resulting in the breath samples being an unlawful search and seizure.

[12] Finally, it is alleged that Ms. Densmore did not clearly waive her right to contact counsel.

[13] I begin with the issue of whether the officer had reasonable suspicion to make an approved screening device demand.

[14] The defence points to a fairly innocuous driving pattern which prompted the traffic stop. It was based on the fact that Ms. Densmore was travelling slower than the speed limit with her signal light activated well in advance of her turn. The defence argues that once the officer stopped her and noted both her age and the fact that she had two loose dogs in the back of the vehicle, her cautious driving pattern was understandable. It should not have been used as part of his decision to have her provide a sample of her breath into the screening device.

[15] Although the officer's concern about the driving pattern may have been tempered by what he discovered upon approaching the vehicle, I am unable to conclude that his initial concerns were no longer of interest to his motor vehicle stop.

[16] The officer smelled a scent of liquor from Ms. Densmore's breath when he placed his head inside the open driver's side window. The defence argues that the scent could have been from the box of wine on the front seat. The officer agreed that if the box was open, residual wine could have been on the spigot and that wine produces an odour of liquor. As the traffic stop was made mid-afternoon, the defence argues that Ms. Densmore's admission that she drank a glass of wine that morning was of no assistance in forming grounds of a reasonable suspicion that she had alcohol in her body.

[17] While the officer initially agreed that he had no reason to disbelieve Ms. Densmore's professed drinking pattern and believed that one glass of wine in the morning would leave no alcohol in her system by the time of this incident, he stated in redirect examination that, in his experience, drivers underestimate their drinking pattern. In terms of the scent of liquor on Ms. Densmore's breath, I find that the officer's evidence is not compromised by the possibility that the box of wine was open and that wine on the spigot produced an alcohol smell.

[18] As stated by the Supreme Court of Canada in *R. v. Chehil*, 2013 SCC 49:

> 34 ... the obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations …

[19] I find that the officer sufficiently isolated the odour of liquor as coming from the driver's breath. As depicted in the video from the officer's vehicle and as described in his testimony, he placed his head inside the vehicle through the open driver's side

window beside which Ms. Densmore was sitting, at which time he smelled alcohol from her breath.

[20] The officer had both subjective grounds and reasonable objective grounds to reasonably suspect that Ms. Densmore had alcohol in her body at the time of driving.

[21] The defence also takes issue with the fact that the officer arrested her for impaired driving, for which he had insufficient grounds.

[22] It is true that the officer in his evidence did not articulate a link between a fail on the approved screening device and reasonable grounds to arrest for impaired operation of a motor vehicle. However it is evident, based on his testimony, that he believed he had reasonable grounds to arrest and to make a breathalyzer demand, based on the fail result from the approved screening device, which his training led him to understand that Ms. Densmore's blood alcohol level was greater than 100 mg%. He also considered the scent of alcohol on her breath and her driving pattern.

[23] After the approved screening device fail result, it is obvious from the officer's conversation with Ms. Densmore that he would be requesting her to provide breathalyzer samples at the detachment. In these circumstances, the fact that the officer did not specifically articulate that he was arresting her for driving with a blood alcohol level over the legal limit does not, in my view, result in an arbitrary detention.

[24] I also find that Ms. Densmore’s rights, pursuant to s. 10(a) of the *Charter* were not breached. Considering the surrounding circumstances, I have no hesitation in

finding that she understood the general reasons for her arrest and was in no way prejudiced by the language the officer used. (see *R. v. Evans*, [1991] 1 S.C.R. 869)

[25] The next issue is the timing of the breathalyzer demand.

[26] Upon arrest, the officer mentioned to Ms. Densmore that he would be requesting breath samples, but did not formally read the breathalyzer demand until close to 20 minutes later. In this situation, the making of the demand is clearly not as soon as practicable, as required by s. 254(3) of the *Code*. A breach of Ms. Densmore's *Charter* rights therefore ensued.

[27] However, as seems to be conceded by the defence, in the circumstances of this case, the evidence of the breath samples should not be excluded pursuant to s. 24(2) of the *Charter*. The officer was acting in good faith by taking Ms. Densmore's dogs to her home. In doing so, he forgot to formally read her the breath demand.

[28] Having balanced the three-pronged test in *R. v. Grant*, [1991] 3 S.C.R. 139, I find that this breach does not warrant exclusion of the breath samples.

[29] The final issue advanced by the defence is the manner in which the officer dealt with Ms. Densmore's right to counsel.

[30] Ms. Densmore asserted her right to counsel at the scene by requesting to speak to a private lawyer known to her. At the detachment, the officer attempted once to contact this lawyer without success. He asked if she wanted him to try to contact her lawyer at home. In response, Ms. Densmore questioned whether she really needed to speak to a lawyer. The officer explained that she could speak to an on-call lawyer from

Legal Aid. In so doing, he used an unfortunate phrase, "If you're confused or you don't know exactly what's going on, you can talk to Legal Aid."

[31] As pointed out by the defence, although the officer likely made the statement in an innocent way, it could nonetheless be interpreted by the receiver in two fashions. The more negative of the two is that a lawyer is available if you are in a state of confusion based on your consumption of alcohol. A detainee might be concerned that a call to Legal Aid would therefore buttress the notion that she is impaired. In any event, despite this phraseology, Ms. Densmore initially seemed interested in the proposition but ultimately declined. She agreed to provide samples of her breath.

[32] This situation demanded a fair amount of caution on the officer's part. Ms. Densmore had indicated at the scene and at the detachment a desire to speak to her own lawyer. The officer subsequently inserted himself into the process of locating this lawyer for her. When he called her lawyer of choice, he did not leave a message as Ms. Densmore may well have done on her own.

[33] As stated by the Alberta Court of Appeal in *R. v. Wolbeck*, 2010 ABCA 65:

> 22 Once the police have discharged their informational and implementational duties they are entitled to take a passive role with respect to the accused's right to counsel. But merely because the police go further than their bare duties does not automatically mean that there is an infringement of the accused's right to counsel. Further involvement by the police, or gratuitous assistance rendered to the accused in exercising the right to counsel, does not equate to a breach of the *Charter* right. "Assistance" or "involvement" are not the same thing as "interference" or "infringement". The determination of whether the involvement of the police is "interference" or "assistance" is one best left to the trier of

> fact as it will be highly dependent on the circumstances in each case.

[34] Although the officer was attempting to assist Ms. Densmore, he may have in fact complicated the situation. For example, his reference to reasons for contacting Legal Aid was quite unhelpful. There are more reasons to speak to a lawyer than for the purpose of attempting to resolve confusion.

[35] In my view, when the attempt to contact Ms. Densmore's lawyer on one occasion and at one location was unsuccessful and she commenced wavering about her need for a lawyer, the officer should have been very careful on how to next proceed. I am not persuaded by the Crown's argument that Ms. Densmore displayed a lack of diligence in contacting counsel. She was seemingly uncertain as to whether to pursue attempts to contact counsel after the unsuccessful first attempt. The conversation the officer had with Ms. Densmore after this attempt, culminating in her decision not to further pursue her right to counsel was just over a minute in length. As a result of the role the officer had taken in this matter and because of her apparent inexperience in matters of this nature, Ms. Densmore was relying on his assistance. Any subsequent waiver of counsel should have been fully informed.

[36] In these circumstances, the officer should have provided her with a *Prosper* warning (*R. v. Prosper*, [1994] 3 S.C.R. 236), which the Supreme Court of Canada outlined at para. 50:

> In addition, once a detainee asserts his or her right to counsel and is duly diligent in exercising it, thereby triggering the obligation on the police to hold off, the standard required to constitute effective waiver of this right will be high. Upon

> the detainee doing something which suggests he or she has changed his or her mind and no longer wishes to speak to a lawyer, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee.

[37] In the circumstances of this case, the officer was obligated to advise Ms. Densmore that he must hold off from attempting to elicit incriminatory evidence until she had a reasonable opportunity to contact counsel. At least this would have impressed upon her the fact that she could take some time, as opposed to reflecting upon it very briefly, before making this important decision.

[38] This fact pattern is very different from that in *R. v. Jones*, 2005 ABCA 289. In that case, the accused attempted on his own to reach counsel in a private phone room. After he was unsuccessful in contacting his lawyer, the accused explicitly stated that he did not wish to speak to another lawyer. He did not indicate a need for additional time or any assistance.

[39] In all of the circumstances, I find that the Crown has not proved a valid waiver of Ms. Densmore's right to counsel.

[40] Turning to s. 24(2) considerations, I consider the three-part test enunciated in *Grant*, namely:

- the seriousness of the *Charter* infringing conduct;
- the impact on the *Charter*-protected interests of the accused; and
- society's interest in the adjudication of the case on its merits.

[41] In terms of the seriousness of the infringement, I would first reiterate that the officer was acting in good faith throughout his interactions with Ms. Densmore. That being said, courts can never lose sight of the importance of the right to counsel which allows a detainee the opportunity to understand her rights, especially in the context of self-incrimination. The law in this area is well-established. Officers should be well-versed with respect to their obligation to refrain from eliciting self-incriminating evidence until the detainee has had a reasonable opportunity to reach counsel. I find the seriousness of the *Charter*-infringing conduct to be high. Such conduct favours exclusion of the evidence.

[42] Regarding the impact of the infringement, the situation in which Ms. Densmore found herself is a good example of the need for police to be vigilant when dealing with the right to counsel. She is an older, cooperative, and non-assertive individual who appears unfamiliar with the workings of the criminal justice process. She displayed an uncertainty as to how to proceed after the first attempt to contact her lawyer failed. She appeared to be relying on the officer for assistance. Unfortunately, some of the language the officer used in attempting to explain alternatives was confusing. It even may have dissuaded Ms. Densmore from contacting Legal Aid. The overall impact on Ms. Densmore's *Charter*-protected rights was serious. This favours exclusion of the evidence.

[43] In considering the third prong of *Grant*, offences associated with drinking and driving are serious. There is a strong public interest in the detection of individuals who operate motor vehicles while under the influence of alcohol. The results of the

breathalyzer are crucial to the Crown's case. This prong of the test favours inclusion of the evidence.

[44] On balance, I find that, based on the seriousness of the *Charter* breach, its inclusion would bring the administration of justice into disrepute. The evidence of the breathalyzer readings is therefore excluded.

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CHISHOLM J.