Citation: *R. v. Gattie*, 2007 YKTC 71

Date: 20071029
Docket: 07-11014
Registry: Dawson City

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

R e g i n a

v.

James Daniel Gattie

Appearances:
David McWhinnie — Counsel for Crown
Emily Hill — Counsel for Defence

REASONS FOR JUDGMENT

[1] Mr. James Gattie was charged with drinking and driving offences contrary to section 253(a) and (b) of the *Criminal Code* as a result of an incident that occurred on June 1, 2007 at or near Dawson City, Yukon Territory.

[2] The circumstances are as follows.

[3] Constables Hughes and Telep were on patrol in Dawson City on the evening of May 30 and the early morning of June 1, 2007. They received a complaint from the operators of the Dawson City ferry that a number of youth, as pedestrians and driving vehicles, were traveling back and forth on the ferry in an intoxicated condition. The officers attended at the ferry landing on the Dawson City side in order to investigate the complaint. They arrived late, after the passengers had disembarked and the ferry had left for the other side. They resumed their patrol in Dawson City, and because they became engaged in other

investigations, they missed the ferry several times. They received several more complaints about intoxicated youth traveling back and forth on the ferry.

[4] It should be noted that these complaints were not particularized. No names or specific descriptions of individuals or cars were given. The complaints did specify that the youth were traveling back and forth from a large campground whose entrance was 400 metres from the ferry landing across from Dawson City.

[5] It is well known that very few people live on this side of the Yukon River and at 1:00 a.m., very few permanent residents would be using the roads. It is also well known that many of the young people who come to work in Dawson City for the summer tourist season live in the campground and that they travel to work on the ferry.

[6] The Constables took the ferry to go to the south side of the river in order to investigate the complaints received. Although they did not discuss what they were going to do specifically, both understood that they were going to check vehicles for impaired drivers, young people for underage drinking and drivers for proper licences and insurance.

[7] As they approached the ferry landing, Constable Telep notices two vehicles drive up to the ferry landing. She decided to check these vehicles. On disembarking and driving towards the first vehicle, she noticed that the driver was a youth and that three passengers were also young people. She parked the patrol car next to this vehicle with the emergency lights flashing. While Constable Hughes dealt with the passengers, Constable Telep approached the driver.

[8] Constable Telep initiated the conversation with Mr. Gattie, the driver, by telling him that she had received a lot of calls about kids drinking and driving. She asked him whether he had been drinking and he replied that he had. She asked how much he had to drink and he replied, four beers. Constable Telep

observed the smell of “alcohol” emanating from the vehicle, Mr. Gattie’s husky voice, which she described as a “whiskey” voice, slurred speech and glassy eyes. She formed the opinion that he was under the influence of alcohol and asked him to step out of the vehicle. She noticed that he stumbled a bit. She placed him in the back seat of the police vehicle. She also noticed that he was very talkative. She then advised him that he was under arrest for impaired driving, advised him of his rights and made a breathalyzer demand.

[9] Mr. Gattie was transported to the police detachment by Constables Hughes and Telep. When told he could contact a lawyer, Mr. Gattie stated he did not want to talk to a lawyer. According to Constable Telep, he was unequivocal about this. There was no suggestion that Mr. Gattie’s capacity was diminished to the extent that he did not understand his predicament or did not appreciate the possible consequences of his decision.

[10] Contrary to Mr. Gattie’s expressed wishes, Constable Hughes decided that he would call the legal aid answering service and place Mr. Gattie in touch with a lawyer. He placed Mr. Gattie in the interview room at 1:52 a.m. There was a delay until a lawyer returned the officer’s call. The phone was given to Mr. Gattie. I am satisfied by the brief nature of his discussion with counsel that Mr. Gattie told the lawyer that he did not want legal advice and that he then terminated the call. Mr. Gattie was presented to the breathalyzer machine at 2:09 a.m. The readings from the samples given were 150 and 160 mg/%.

[11] Defence counsel raised three issues:

1. Was the stop at the ferry landing an unlawful random stop?
2. Did Constable Telep have reasonable and probable grounds to believe that Mr. Gattie had committed an offence under s. 253 of the *Criminal Code*?
3. Did the delay resulting from Constable Hughes contacting legal aid against Mr. Gattie’s wishes result in the breath samples being given

> in violation of s. 254(3) of the *Criminal Code*? That subsection requires that the breath sample be given as soon as is practicable after the breath demand is made.

Unlawful Random Stop

[12] Although the Gattie vehicle was already stopped when the Constables pulled up beside it, I am satisfied that by activating the emergency lights there was a detention. In my opinion, however, this detention was neither random or arbitrary.

[13] Constables Telep and Hughes had received numerous complaints of intoxicated young people traveling back and forth on the ferry, both on foot and by car. That information included the fact that there was a party at the campground. The campground was located 400 metres from the ferry landing where Mr. Gattie's vehicle was stopped, waiting to board the ferry. Constable Telep observed young people occupying the vehicle, consistent with the complaints received. She knew that at 1:00 a.m., it was unlikely that the vehicle was operated by permanent residents and that it was much more likely that the occupants were from the campground, the location of the drinking party.

[14] On these facts, Constables Telep and Hughes had reasonable grounds to detain the Gattie vehicle for further investigation. The term "reasonable grounds to detain" is preferred to the American phrase, "articulable cause".

[15] The Supreme Court of Canada reviewed the law with respect to investigative detention in the decision of *R. v. Mann,* [2004] S.C.J. 49, stating, at paras. 34 and 35:

> The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions

> to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.
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> Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.

[16] The decision in *Mann*, *supra*, authorizing detention for investigative purposes was affirmed in *R. v. Clayton,* [2007] S.C.J. 32. The *Clayton* decision is summarized in the headnote as follows:

> Appeal allowed and convictions restored. Sections 8 or 9 of the Charter were not violated. The police constables lawfully exercised their common law powers when they detained and searched the accused. In determining the boundaries of police powers, caution was required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what was reasonably necessary to perform their duties in protecting the public. Searches

> incident to an investigative detention could be justified if the officer believed on reasonable grounds that his or her own safety, or the safety of others, was at risk. The initial and continuing detentions of Clayton and Farmer's car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention. Requiring police to stop only those vehicles described in the 911 call imposed an unrealistic burden on police in this case, which was inconsistent with their duty to respond in a timely manner, at least initially, to the seriousness of the circumstances. Based on their observations, there were reasonable grounds for the police to conclude that the two occupants of the car they had stopped were implicated in the crime being investigated. The officers' safety concerns also justified the searches incidental to the lawful investigative detention.

[17] In the case at bar, the initial detention of the Gattie vehicle was justified based on the information received by the police. The safety of the public is threatened by impaired drivers. The timing and location of the detention related to the information available. The detention was very brief. The detention involved a motor vehicle that was already stopped.

Reasonable Grounds to Make a Breath Demand Pursuant to s. 254(3)

[18] When Constable Telep spoke to and observed Mr. Gattie, she obtained the following information:

- Mr. Gattie admitted to consuming four beer;
- There was a smell of alcoholic beverage coming from the car and from Mr. Gattie;
- He spoke with a husky or “whiskey” voice, which in Constable Telep’s experience could be related to intoxication;
- His speech was slurred and his eyes were glassy;
- He was unsteady of his feet; and
- He was overly talkative.

On these facts, I find that Constable Telep had reasonable and probable grounds to believe that Mr. Gattie's ability to operate a motor vehicle was impaired by alcohol.

Were the Breath Samples Given as Soon as Practicable?

[19] The evidence indicates that the delay caused by Constable Hughes insisting that Mr. Gattie speak to a lawyer was less than 17 minutes. Constable Telep's notes indicated that she arrived at the interview room at 1:52 a.m. and the first sample was given at 2:09 a.m. But before she could take a sample, Constable Telep first had to set up the machine, warm it up and get it ready. I am satisfied that the maximum delay in providing a sample by Constable Hughes' actions was in the range of 10 to 12 minutes or less.

[20] The question of delay in taking a breath sample pursuant to s. 254(3) has been considered in several cases, including *R. v. Knaack*, 2006 YKTC 81, which reviews a number of related cases.

[21] In *R. v. Maudsley,* [2006] O.J. 3619 (Ont.C.J.) it was held that a delay in the administration of breathalyzer tests caused by an officer's decision to contact counsel for an accused contrary to his or her express wishes, may result in the breathalyzer results being excluded.

[22] In *R. v. Kubas*, [1996] O.J. No. 4828, a 23 minute delay due to the officer calling counsel over the objections of the accused resulted in the exclusion of the breathalyzer results. This decision was upheld on appeal: [1997] O.J. No. 4230.

[23] The justification of exclusion in these circumstances is stated in *R. v. Hesketh*, [2003] B.C.J. No. 1242 at para. 42:

> It must be borne in mind that the right to counsel is an individual constitutional right and that the decision to exercise it or not to exercise it is one that is exclusively that of the subject individual. It cannot be

> appropriated by another person, regardless of how well-intentioned that other person might be. This is not to say that a police officer can never contact counsel on behalf of an accused person or arrange for some third-party to do so. Where a police officer encounters an accused person who, by words or actions, expresses a lack of understanding of his right to counsel or is uncertain as to whether he or she ought to exercise that right, the law requires that officer, in my view, to take further steps to ensure that the right is understood and that any decision not to exercise it is an informed decision.

[24] In *Hesketh, supra*, a delay of almost 30 minutes resulted in the exclusion of the Certificate of a Qualified Technician.

[25] A similar result can be found in *R. v. Davidson*, [2005] O.J. No. 3474 where there was a delay of 35 minutes while the police waited for duty counsel to return their call, despite the accused's statement that he did not want to talk to a lawyer. The court stated, at para. 28, that:

> With respect, and for the foregoing reasons, I find that the learned trial judge erred in concluding that the 35-minute delay occasioned by the police contacting duty counsel, was reasonable in the circumstances. Thirty-five minutes of unexplained and therefore unjustifiable delay, is substantial in the context of the two-hour limit on the taking of the first breath sample. Consequently the breath tests were not administered as soon as practicable, and the prosecution should have been denied the benefit of the presumption of identity. I am satisfied that the appellant would have been found not guilty at his trial if this error had not been made.

[26] *R. v. Barrick* (1998), 36 M.V.R. (3d) 258 (Ont. Gen. Div.) sets out an analytical framework for determining whether an officer's decision to contact duty counsel contrary to an accused's express wishes would result in the exclusion of the breathalyzer tests, at para. 47. The framework can be summarized as follows:

> 1. The first question is whether there has been a clear and unequivocal waiver by the accused of the right to counsel;
> 2. If the waiver was not clear and unequivocal it is reasonable for the police to contact duty counsel in order to avoid later being confronted with the argument that the accused's right to counsel was infringed;
> 3. If the degree of the accused's intoxication is such as to create a reasonable basis for the police to conclude that the right to counsel was not fully comprehended it would be reasonable for the police to contact duty counsel to avoid a subsequent allegation of a breach of the right to counsel;
> 4. If the waiver is clear and unequivocal it is not reasonable, as a matter of law, for the police to contact duty counsel thereby delaying the administration of the breath tests. Where the delay occasioned by the call to duty counsel is unreasonable it is effectively unexplained;
> 5. The innocence of the police motive in placing the call to duty counsel is irrelevant, as an accused should not be forced to speak to counsel where he or she clearly wishes to waive that right;
> 6. There is no requirement that an accused repeat or persist in a waiver or express the waiver in strong terms. As in other areas of law, "no means no";
> 7. The fact that an accused ultimately takes a call from duty counsel does not, by itself, operate as an estoppel of the waiver. All the surrounding circumstances must be examined to discern if the waiver has been withdrawn.

[27] Other cases have questioned the reasoning in the forgoing cases. For example, in *R. v. McCann,* [2006] O.J. No. 1582 the court dismissed an appeal of conviction in a case where there was a 13 minute delay waiting for counsel to call back. The decision was based on the fact that the accused had not been adamant about waiving his right to counsel and had in fact accepted the call. The court went on to consider *R. v. Kusnir*, [2002] O.J. No. 10, observing:

> … It may be that the correctness of these cases is open to question because they do not interpret Criminal Code s. 258(1)(c)(ii) purposively. Nor do they interpret it in light of, and subject to, the Charter-

> protected right to counsel. The courts should encourage the police to err, if at all, on the side of ensuring that an accused actually gets access to counsel. Courts encourage the opposite when they penalize the police for ensuring access to Counsel. It defeats the purpose of the Charter, trivializes the right to counsel, and carries the wrong message to the police to penalize them for putting the accused in touch with counsel when there is the slightest doubt about waiver.
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> …
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> Even if these cases are correct, they should be interpreted restrictively. A voluntary waiver of the right to counsel, in order to be valid and effective, must be premised on a true appreciation of the consequences of giving up that right. It seems only prudent, particularly when people have been drinking and there are reasonable and probable grounds to believe they are impaired or over 80, to resolve any possible doubt against waiver in favour of the right to counsel. Where there is any doubt at all about waiver it should be clear that there is a bright line duty on the police to ensure access to counsel. Otherwise the courts discourage, rather than encourage, access to counsel by detained persons.

[28] The court in *Maudsley, supra*, rationalized these different approaches, holding that in order to exclude the breathalyzer results for delay caused by the police calling counsel over the objections of the accused, a court must find that:

1. The accused expressly and unequivocally waived his right to counsel;
2. The officer nevertheless contacted duty counsel for the accused;
3. A delay in taking of the tests resulted because of the officer's actions;
4. The delay in the circumstances was significant.

[29] I agree with the foregoing rationale.

[30] Taking into account all of the circumstances, I find that the delay of 10 to 12 minutes caused by Constable Hughes contacting counsel over Mr. Gattie's objections was not significant.

Conclusion

[31] For the reasons indicated, I find that the detention of Mr. Gattie was not unlawful, that there were reasonable grounds to make a breath demand pursuant to s. 254(3) of the *Criminal Code* and that the delay in taking the breath samples caused by Constable Hughes was not significant.

[32] In the result, the Certificate of Analysis is admissible. I find Mr. Gattie guilty of the offence contrary to s. 253(b) of the *Criminal Code*.

Lilles T.C.J.