Citation: *R. v. Gibb*, 2005 YKTC 14

Date: 20050218
Docket: 03-00517
Registry: Whitehorse

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

R e g i n a

v.

Robert Douglas Gibb

Appearances:
David McWhinnie — Counsel for Crown
Keith Parkkari — Counsel for Defence

DECISION ON VOIR DIRE

[1] The accused, Robert Douglas Gibb, makes application to the court to exclude evidence of a statement made by Mr. Gibb to Constable Wirachowsky of the R.C.M.P. due to an alleged breach of the accused's rights under s. 10(b) of the *Charter*.

[2] The application actually goes much further. The accused contends that, if the statement is excluded, a search warrant that I issued authorizing a search of Mr. Gibb's residence should be declared invalid since a substantial portion of the information used to obtain the warrant consists of information disclosed by the accused during the course of giving the statement to Cst. Wirachowsky.

[3] Finally, if the warrant is invalid, the accused seeks the exclusion from evidence at his trial of the items the police seized during the search of the

accused's residence. The items in question are computer equipment on which, according to the police, child pornography is, or has been, stored.

[4] The application to exclude the statement rests on the accused's contention that he was detained at the time he gave the statement. If he was, he should have been advised of his right to counsel in conformity with the decision of the Supreme Court of Canada in *R.* v. *Brydges*, [1990] 1 S.C.R. 190. The Crown concedes that this was not done.

[5] The circumstances surrounding the taking of the statement in question are as follows. Cst. Wirachowsky had received information from a therapist working in a sex offender treatment program that one of his clients, who is the son of the accused, was in possession of pornography, including child pornography. The therapist had been given this information by the client's mother. Cst. Wirachowsky contacted the mother, who is Mr. Gibb's ex-wife. She advised Cst. Wirachowsky that her son had provided conflicting accounts of how he came to be in possession of the materials. One of the versions was that he had obtained the images from the accused. Cst. Wirachowsky took possession of the materials, which included some photos of a nude adult woman and some child pornographic images. The latter appeared to have been downloaded from the Internet and printed.

[6] Cst. Wirachowsky telephoned Mr. Gibb and asked him to come down to the police detachment. The accused agreed to come. It is not clear exactly what Cst. Wirachowsky told the accused as to the nature of the inquiry.

[7] The following day, the accused went to the police station and was taken to an interview room by Cst. Wirachowsky. The Constable told Mr. Gibb he was investigating the possession of pornography by Mr. Gibb's son. Cst. Wirachowsky showed Mr. Gibb the photos of a nude woman. Mr. Gibb indicated that the photos were of his ex-girlfriend. Cst. Wirachowsky next showed the

accused some of the images of children engaged in sexual activities. The accused admitted that he had downloaded the images “a long time ago”. Cst. Wirachowsky put up his hand, cautioned Mr. Gibb that he need not say anything and that he could “call a lawyer or free legal aid.”

[8] The Constable then said he would be right back. He left the interview room, obtained an audio recorder and activated the video recording equipment installed in the interview room. The Constable returned to the interview room and the following exchange took place:

> Constable: “… you told me that these items here are yours and I told you, you can call a lawyer, right?”
>
> Mr. Gibb: “Right.”
>
> Constable: “And that anything you say is ahhh admissible, whereas it can be used against you and that I didn’t threaten you or promise you anything, correct?”
>
> Mr. Gibb: “Correct.”

[9] The accused went on to again admit to downloading child pornography from the Internet. He said that he had stored some of this material with other effects at his ex-wife’s residence and that his son must have found the material there. He denied that he currently possessed any such material and indicated that he had brought with him a hard drive from his computer to prove it. During the interview, Cst. Wirachowsky asked Mr. Gibb where he worked. Mr. Gibb asked if he had to answer the question and was told that he did not. Mr. Gibb declined to answer the question.

[10] Toward the end of the interview, Cst. Wirachowsky asked Mr. Gibb if there was anything else he wanted to say:

> Mr. Gibb: “Umm, just this. I understood from what you’re your [sic] warning to me that I didn’t have to say anything.”

Constable: “Right.”

Mr. Gibb: “I wanted to tell you the truth.”

Constable: “Uh huh.”

Mr. Gibb: “I wanted to be cooperative.”

[11] Cst. Wirachowsky testified that, when he first confronted Mr. Gibb with the pornographic materials, he expected that Mr. Gibb would deny knowledge of them. At that point, Cst. Wirachowsky said he would have given the accused a warning about the serious nature of possessing child pornography and ended the interview. To his surprise, Mr. Gibb admitted to possessing the materials.

[12] After the interview was concluded, the Constable spoke to his supervisor to ask his opinion on whether or not there were grounds to arrest Mr. Gibb. The accused was then arrested and chartered. At this point, the accused appeared to have a seizure. Cst. Wirachowsky doubted that the seizure was genuine but out of an abundance of caution, the accused was taken to the hospital to be examined. There, Mr. Gibb produced a knife and threatened to commit suicide but Cst. Wirachowsky managed to disarm the accused.

[13] As *R.* v. *Moran* (1987), 36 C.C.C. (3d) 225 (O.C.A.) makes clear, a person is not detained as soon as a person sets foot inside a police station. Indeed, Mr. Parkkari, counsel for Mr. Gibb, conceded that the accused was not detained when he first went into the interview room with Cst. Wirachowsky. However, he argues that the situation changed fundamentally once Mr. Gibb admitted possessing the child pornography. From that point on, Mr. Gibb was detained.

[14] The onus is on the applicant to establish on balance that a *Charter* breach occurred. See *R.* v. *Oickle,* [2000] 2 S.C.R. 3 at para. 30. It follows that the

accused, Mr. Gibb, bears the burden of establishing that he was detained – or, at least, reasonably believed that he was.

[15] In *R.* v. *Therens*, [1985] 1 S.C.R. 613 the Supreme Court of Canada held that detention occurs when an agent of the state assumes control over the movement of a person by a demand or direction that may have significant legal consequences and which prevents or impedes access to counsel. The necessary element of compulsion or coercion can arise from the fact that there may be criminal liability for failure or refusal to comply. The most common example of this is a police demand that a person suspected of drinking and driving take a breath test.

[16] No such circumstances exist in this case. However, *Therens* also holds that the element of compulsion or coercion can also arise in circumstances where the accused reasonably believes that he does not have a choice but to remain or to do as the officer asks.

[17] The factors enumerated in *Moran, supra,* at pp. 258-259 provide guidance to the court in determining whether or not such a belief existed in the mind of the accused. However, the list is not exhaustive, nor is a finding with respect to any one of the factors determinative. It is the overall situation that must be examined.

[18] As stated, if there was a detention here, it is because the accused reasonably believed that he had no option but to remain and answer the officer's questions. Mr. Gibb did not testify on the *voir dire*, so the question falls to be determined from the circumstances.

[19] When Mr. Gibb was called to the police station, the investigation was at a very early stage. Mr. Gibb was no more than a person of interest. As Cst. Wirachowsky indicated, he was not really expecting to obtain an admission from Mr. Gibb, but rather to use the opportunity to deliver a warning. As Mr. Gibb

concedes, he was not detained at the outset. At issue is whether or not the accused's admission, without more, moved the situation into a detention thus triggering the need for full *Charter* warnings before the interview could continue.

[20] Cst. Wirachowsky says that he was unsure if he had reasonable grounds to charge Mr. Gibb with possession of child pornography even after the interview was concluded. Why he would be in such a state of doubt, when the accused had admitted to possessing such material, is beyond me. However, given that the courts seem to continually grapple with the question of what does and does not constitute reasonable grounds, one should not be too swift to adopt an air of superiority. There is some support for the Constable's claim since, after the interview was concluded, he went to consult with his superior on the question.

[21] Whatever Cst. Wirachowsky thought, it remains clear that, on objective analysis, reasonable and probable grounds existed as soon as Mr. Gibb admitted possessing the child pornography.

[22] Nevertheless, it is difficult to see how this fact, taken alone, operates to transform what had been a voluntary interview into a detention. This is not a case like *R.* v. *Black*, [1989] 2 S.C.R. 138 or *R.* v. *Evans*, [1991] 1 S.C.R. 869 where the accused's degree of jeopardy changed dramatically during the course of police questioning. This interview dealt with possession of child pornography from start to finish.

[23] If we look at the matter from the point of view of what the accused would reasonably believe, it is obvious that he would reasonably believe that he was in greater jeopardy after he admitted possession than he was before he did so. However, this does not mean that he would believe that he was now detained. To the contrary, his refusal to answer certain questions and his spontaneous comments at the conclusion of the interview indicate clearly that he knew he didn't have to say anything and he knew he did not have to cooperate.

[24] After the admission, Mr. Gibb was twice advised that he need not say anything and that he could call a lawyer. The police officer took steps to record the proceedings. These actions could suggest that the officer was moving to exercising a greater degree of control over the accused. They move the circumstances closer to the point of detention. On the other hand, warnings were provided and they were obviously understood. As indicated, Mr. Gibb's comments show that he remained in control of the decision to leave or to stay and the decision to talk or say nothing.

[25] *R. v. Voss* (1989), 50 C.C.C. (3d) 58 (O.C.A.), was also a case where the issue was whether or not the accused had been detained. The majority decided that Mr. Voss had, indeed, been detained. Tarnopolsky, J.A. described the case as difficult, however, because it was "so close to the dividing line" between police questioning and detention.

[26] In that case, police were investigating the death of the accused's wife. Mr. Voss was taken to the police detachment in a police car and questioned at some length. The accused was later driven back to his home but remained in the company of several police officers. There was persistent and repeated questioning of the accused over a number of hours during which time the accused was confronted repeatedly with evidence the police had obtained from a pathologist concerning the cause of Mrs. Voss's death. Mr. Voss testified that he felt he had no option but to comply with the police demands.

[27] The contrast between what occurred in *Voss,* and what occurred here, is obvious.

[28] In the result, I find that no breach has been shown. The statement will not be excluded on the grounds that it was obtained in violation of Mr. Gibb's s.10(b)

rights. It follows that the application to quash the search warrant and to exclude the evidence obtained as a result of the search are, likewise, dismissed.

Faulkner T.C.J.