Citation: *R. v. Glynn*, 2013 YKTC 119

Date: 20131010
Docket: 12-00620A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

THOMAS DESMOND GLYNN

Appearances:
Ludovic Gouaillier — Counsel for the Crown
André Roothman (Agent for Calvin Barry) — Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY J. (Oral): Mr. Glynn is charged with impaired driving and driving while the concentration of alcohol in his blood exceeded the legal limit in relation to a single vehicle accident on August 26, 2012.

[2] By agreement, all of the applicable evidence was called within a *voir dire* format to allow me to rule on both the defendant's *Charter* application for exclusion of the blood alcohol readings and on the ultimate issue of the defendant's guilt or innocence. Accordingly, this decision covers both the *Charter* ruling and the trial decision.

[3] As a preliminary matter, the blood alcohol readings in question stem from an analysis of blood samples seized by the RCMP from Whitehorse General Hospital, pursuant to a s. 487 warrant. Recognizing that the blood was not obtained pursuant to a valid demand such that the presumption of blood alcohol level at the time of driving is available to the Crown and further recognizing that he was not calling an expert to provide the necessary extrapolation from the time the samples were taken back to the time of the alleged driving, the Crown conceded at the outset that the offence of driving while over the legal limit cannot be made out. Count #2 is hereby dismissed for want of evidence.

[4] Notwithstanding the dismissal of Count #2, Crown nonetheless seeks to rely on the evidence of the blood alcohol readings in relation to the charge of impaired driving. Defence seeks to exclude the readings, asserting a violation of ss. 8 and 10(b) of the *Charter*.

[5] The facts before me establish that RCMP members Cst. Leggett and Cst. Carr were on duty working night shift in Whitehorse, Yukon, on August 26, 2012. In the early morning hours, they drove up South Access to the Alaska Highway intersection. They turned left onto the Alaska Highway and drove to the Mount Sima area, where they turned around.

[6] Shortly after turning onto the South Access off-ramp to head back downtown, Cst. Leggett noted a light shining from the ditch area on the far side of South Access, which he then realized was coming from a vehicle. The officers turned around to investigate. They located a vehicle resting on its side in the brush on the far side of

South Access. Cst. Leggett indicated that the vehicle had not been there when they had driven up South Access, which he estimated to be no more than 10 minutes before.

[7] He described the conditions as being very dark, in terms of natural light, but noted the intersection of the Alaska Highway and South Access to be well lit. While there was some indication of drizzle earlier in the evening, the roads were dry, in good condition, and there was little to no traffic.

[8] By its condition, as seen in photographs filed as Exhibit 3 in the *voir dire*, the vehicle had clearly rolled at least once. Photographs filed as Exhibit 4, taken the following day during daylight hours, show markings which suggest that the vehicle had been travelling northbound on the Alaska Highway, had failed to navigate the South Access off-ramp, crossed the eastbound South Access lanes, the median, and the westbound South Access lanes before entering the ditch on the opposite side and coming to rest on the driver's side, approximately 50 to 100 feet into the brush.

[9] No accident reconstruction was completed in relation to the accident. Seized from the scene were an unopened bottle of scotch and an empty bottle of wine, both 750 millilitres in size.

[10] When Cst. Leggett arrived at the vehicle, he found a man standing in the vehicle with his head out of the passenger side window with blood on his face. He was unable to get out of the vehicle on his own and appeared disoriented. Cst. Leggett and Cst. Carr helped him out of the vehicle. Cst. Leggett took the man some distance away because of a concern about the vehicle catching fire.

[11] Cst. Leggett asked the man for his name. The man identified himself as Thomas Glynn. Cst. Leggett noted a smell of alcohol on Mr. Glynn but was not convinced he was legally drunk. He did not arrest Mr. Glynn but did advise him that he was under investigation for impaired driving. He provided a police warning and advised him of his right to counsel. No efforts were ever made to offer Mr. Glynn the opportunity to exercise his right.

[12] Cst. Leggett says that Mr. Glynn was initially confused but responsive. After advising Mr. Glynn of his right to counsel, Cst. Leggett noted that Mr. Glynn became more docile. Cst. Leggett believed that his condition was worsening and noted that Mr. Glynn was not able to answer basic questions, such as where he lived.

[13] The ambulance arrived and Mr. Glynn was transported to Whitehorse General Hospital. It was noted that he made a number of utterances; however, Crown does not seek to rely on anything said by Mr. Glynn.

[14] Cst. Leggett accompanied Mr. Glynn in the ambulance and into the hospital trauma room. He described Mr. Glynn's attitude as up and down, alternating between calm and emotional, and was, at times, vulgar and inappropriate.

[15] Cst. Leggett's observations were largely confirmed by hospital staff. Dr. Jamieson noted that Mr. Glynn smelled of alcohol; that he was quite confused; displayed self-injurious behaviour, such as attempting to pull out his IV; and that he was uncooperative, belligerent, and sexually inappropriate with hospital staff. Nurse Cook said Mr. Glynn presented as altered and described him as obnoxious, sexually

inappropriate, laughing at inappropriate times, and not seeming to recognize the seriousness of the situation.

[16] The evidence is clear that Mr. Glynn had suffered an injury to his head. He was bleeding from a number of lacerations to his scalp, at least one of which required stitching. In addition, Dr. Jamieson indicated that her working diagnosis was one of a concussion. Mr. Glynn was held in the hospital overnight before being released.

[17] Over the course of his treatment, several vials of blood were taken from Mr. Glynn, two of which were seized on August 30, 2012, by Cst. Leggett, pursuant to a s. 487 warrant issued on that same day.

[18] The circumstances surrounding the taking of Mr. Glynn's blood give rise to the defendant's application to exclude the blood alcohol readings on the basis the blood was taken from Mr. Glynn contrary to a s. 8 *Charter* right to be free from unreasonable search and seizure.

[19] The defendant asserts that, on the facts of this case, hospital staff were acting as agents of the state in taking samples from Mr. Glynn, in violation of s. 8 of the *Charter*. The defendant further asserts that evidence of the readings ought to be excluded, pursuant to s. 24(2). Onus is on the defendant to establish the breach of s. 8 on a balance of probabilities.

[20] The facts which relate to this issue are as follows:

[21] According to Cst. Leggett, he attended at the hospital with Mr. Glynn and observed treatment until he felt his presence was exacerbating Mr. Glynn's behaviour.

Cst. Leggett moved out of sight behind a curtain. Once he judged it safe, he asked Dr. Jamieson if she had a minute to talk. He told her he was going to need to obtain samples. He says they discussed the option. He had already ruled out a breath demand due to Mr. Glynn's condition. He and Dr. Jamieson discussed the other options, which included a blood demand only if Dr. Jamieson felt Mr. Glynn would understand. From the conversation, Cst. Leggett concluded that a blood demand would not be medically appropriate. They also discussed the option of the hospital taking samples and he could apply to get a warrant. Dr. Jamieson told him that the samples would be stored for two weeks. Dr. Jamieson then directed Nurse Cook to take the blood samples.

[22] At trial, Cst. Leggett said that he was very clear with Dr. Jamieson that he was not asking her to take blood for him. Cst. Leggett's testimony about the conversation with Dr. Jamieson was challenged by defence counsel in cross-examination on the basis of disclosed notes and documents that suggest Dr. Jamieson and Nurse Cook were responding to more of a request from Cst. Leggett.

[23] The evidence of Dr. Jamieson and Nurse Cook, in relation to their conversations with Cst. Leggett with respect to the taking of blood samples from Mr. Glynn, are of limited assistance in assessing whether, in fact, Cst. Leggett directed them to take blood samples for the use of the police. Both had good recall, in relation to the treatment of Mr. Glynn, and were very clear that a number of vials of blood were taken from Mr. Glynn for medical purposes. However, neither had a clear recollection of the content of their conversations with Cst. Leggett. The most they could say was that it

was possible that Cst. Leggett had asked them to take additional samples of blood for police purposes.

[24] In assessing the evidence on this point, I am satisfied on a balance of probabilities that Cst. Leggett did, indeed, direct hospital staff to take additional samples of blood from Mr. Glynn for police purposes.

[25] I reached this conclusion for a number of reasons:

1. Cst. Leggett's evidence that he told Dr. Jamieson that he was going to need to obtain samples is certainly open to the interpretation by hospital staff that he was making a request that samples be taken for this purpose.

2. Cst. Leggett had Nurse Cook complete a Certificate of Qualified Technician even though the blood was not being taken pursuant to a s. 256 warrant. Completion of the Certificate, filed as Exhibit 7, supports the conclusion that at least one sample was taken specifically for police purposes. I should note that while defence counsel suggested that the evidence supports a finding that two samples were taken for police purposes, in my view, the evidence supports a finding that only one sample was taken for police purposes. The Certificate of Qualified Technician indicates that one sample was taken at 4:30 a.m. by Nurse Cook. There is no time included with respect to the taking of a second sample, although a date has been inserted in the applicable spot. In addition, Nurse Cook completed the part of the form in relation to the description of how she marked the first sample container, while the area

on the form in which to describe how a second sample container was marked has not been completed and has, in fact, been crossed out.

3. In the Information to Obtain prepared by Cst. Leggett in support of his application for the s. 487 warrant and filed as Exhibit 1, he framed his discussion with Dr. Jamieson as follows at paragraph 10(b):

> A 4:06 am I spoke in private with Dr. JAMIESON and advised her that I was investigating GLYNN for Impaired Driving. Cst LEGGETT discussed the two options, the Blood Demand or taking a sample and obtaining a Search Warrant to collect it from the hospital. Dr. JAMIESON advised that the warrant would be the best as GLENN [*sic*] was not currently able to consent, and that extra blood could be taken for a warrant.

This passage supports a finding that there was indeed a conversation between the Cst. Leggett and Dr. Jamieson regarding extra samples being taken for police purposes.

4. In his Case File Synopsis filed as Exhibit 6, Cst. Leggett wrote the following:

> Cst LEGGETT spoke with the on duty emergency doctor who advised that taking GLYNN's blood was not appropriate. Cst LEGGETT requested that blood be taken and that a Search Warrant would be sought.

It is notable that in his summary of the conversation he had with Dr. Jamieson, Cst. Leggett frames it as requests made by him for blood to be taken.

[26] All of these factors taken together support a finding that Cst. Leggett directed hospital staff to take additional blood samples from Mr. Glynn for investigatory purposes and that one sample was, in fact, taken exclusively for police purposes. In such circumstances, hospital staff would be, in my view, acting as agents of the state at least in taking the additional blood sample.

[27] Numerous cases have been filed by counsel in relation to whether such conduct amounts to breach of s. 8 of the *Charter*. The Supreme Court of Canada has made it clear that it is a s. 8 violation for the police to take advantage of the improper conduct of hospital staff in either providing blood samples to the police without warrant or improperly providing information to the police, upon which the police then seek to obtain a warrant, recognizing the high level of privacy in one's medical information and bodily integrity (see, for example, *R. v. Colarusso*, [1994] 1 S.C.R. 20, *R. v. Dersch*, [1993] 3 S.C.R. 768, *R. v. Dyment*, [1988] 2 S.C.R. 417).

[28] The majority of cases provided to me address issues either in relation to police seeking to obtain samples or test results in relation to blood taken for medical purposes, or with police sealing samples taken for medical purposes or instructing medical staff to retain samples taken for medical purposes.

[29] While these cases do offer guidance, the specific issue before me is somewhat different. Fortunately, two of the cases provided to me do deal specifically with the question before me, namely, whether blood samples taken at the request of the police amount to a breach of s. 8. In *R. v. Pohoretsky*, [1987] 1 S.C.R. 945, the Crown conceded the existence of a s. 8 violation, where a physician took a blood sample from

an incoherent and delirious patient at the request of the police. In *R. v. Stokes*, [2007] O.J. No. 4075, two vials of blood were taken for medical purposes, while one vial was taken at the request of the police. The Court held that the third vial, drawn without warrant to further a police investigation, constituted a breach of s. 8.

[30] In my view, a request by the police for hospital staff to take additional blood samples for investigatory purposes does amount to an unreasonable seizure, contrary to s. 8. I am satisfied that the breach has been made out.

[31] In relation to the s. 24(2) analysis, it should be noted that the majority of cases provided to me pre-date the new test for exclusion, as outlined by the Supreme Court of Canada in *R. v. Grant*, [2009] 2 S.C.R. 353, when, as fairly pointed out by the Crown, bodily substances obtained in violation of the *Charter* were almost automatically excluded. Of those cases pre-dating *Grant* which favoured inclusion, most did so on the basis the evidence was otherwise discoverable. Only the *R. v. Murray*, 2011 ONSC 2537 case, provided by the Crown, post-dates the *Grant* decision. Unfortunately, it does not include a s. 24(2) analysis.

[32] The three-pronged test set out in *Grant* requires a balancing of three factors:

1. The seriousness of the breach;

2. The impact of the breach on the *Charter* protected interests; and

3. Society's interests in adjudication on the merits.

[33] In considering the first of the three factors, in my view, the breach in this case falls somewhat lower on the spectrum of seriousness. While the police ought not to have requested that additional blood be taken for investigative purposes, the fact remains that blood would have been taken for medical purposes in any event and would have been held by the hospital for a period of two weeks. Furthermore, I would note that Cst. Leggett did seek prior judicial authorization before actually seizing the blood samples and that the warrant was sought well within the two-week period before even the blood taken for medical purposes would have been destroyed.

[34] With respect to the second of the three factors, the impact of the breach of the *Charter* protected interests, again, I do not see the impact as particularly serious in this case. While the taking of blood samples does involve a significant intrusion in relation to bodily integrity, here, blood samples would have been taken in any event, samples which quite properly could have been obtained by the police by search warrant. Indeed, having found that only one sample was taken at the request of the police and the police having seized two samples when executing the warrant, clearly, at least one of the two samples obtained by the police had been taken for medical purposes.

[35] In considering the final of the three factors, society's interests in adjudication on the merits, the evidence of the readings is not crucial to the Crown's case on impaired driving in the way it would have been in relation to the charge of driving while over the legal limit. I do, however, find there to be a high degree of reliability in the evidence itself and see no reason it should not be available for the limited use it can be put to in an adjudication on the merits on the impaired driving count.

[36] Before concluding the s. 24(2) analysis, I should note that the defendant has argued that there was also a breach of Mr. Glynn's s.10(b) right, as he was advised of his right to counsel but no effort was made to implement that right. A phone was available but he was never offered the opportunity to call counsel. Crown does not seek to rely on any utterances made by Mr. Glynn. However, defence counsel argues that the breach under s. 10(b) ought to be considered in relation to the s. 24(2) analysis.

[37] I should note that Cst. Leggett made no real efforts to illicit any statements from Mr. Glynn beyond his name. I also note Mr. Glynn's disoriented state and the clear need for urgent medical care. In the circumstances, any breach of s. 10(b) could not be considered particularly egregious, nor is it sufficient for me to conclude there to be a pattern of flagrant disregard of *Charter* rights sufficient to warrant exclusion. It simply does not change my views in relation to the s. 24(2) analysis.

[38] On balance, an application of the test as set out in *Grant* does not favour exclusion. Accordingly, the readings will be admitted as evidence on the trial proper. All other evidence on the *voir dire* with the exception of any evidence pertaining to utterances made by the accused is similarly applied on the trial proper.

[39] With respect to the offence of impaired driving, defence counsel advanced a number of arguments in relation to whether this is more properly a case of care and control, and whether the evidence is sufficient to establish that Mr. Glynn was the driver. It is unnecessary, in my view, for me to deal with these issues, as even when I look at the evidence from the perspective of the best possible case for the Crown, I am simply not satisfied that the offence has been made out beyond a reasonable doubt.

[40] The only evidence before me in relation to potential impairment is as follows:

- the accident;
- the smell of alcohol on Mr. Glynn's personal;
- the empty bottle of wine located at the scene;
- certain behaviours exhibited by Mr. Glynn consistent with impairment; and
- the readings I have determined to be admissible.

[41] Each of these must be considered in determining whether they are individually or collectively sufficient to establish impairment.

[42] Turning, first, to the accident, there was absolutely no evidence before me as to the cause. There was no accident re-construction. There was no evidence of a driving pattern. There was nothing upon which to determine conclusively the cause of the accident.

[43] The Crown argues that it is their theory that the accident was a result of impairment. It is the only one that has been advanced. In the absence of any positive evidence of other possible explanations, like momentary inattention or falling asleep, I can conclude that the cause of the accident was impairment. With respect, I disagree. There is no obligation upon the accused, in my view, to proffer alternative explanations.

[44] In reaching this conclusion, I am mindful of the comments of the Yukon Court of Appeal in *H.M.T.Q. v. Schmidt*, 2012 YKCA 12 in which they noted the following:

> [15] In *R. v. Stellato*, [1993] O.J. No. 18, aff'd [1994] 2 S.C.R. 478, the Ontario Court of Appeal held that the offence of impaired driving is proved if the trial judge is satisfied that an accused's ability to operate a motor vehicle was impaired by alcohol or drugs to any degree ranging from slight to great. In order to make out the offence, it must be proven not simply that the accused has consumed alcohol, but also that such consumption impaired the accused's ability to operate a motor vehicle (*R. v. Andrews*, 1996 ABCA 23).

[45] The Court of Appeal noted that the trial judge in *Schmidt* had convicted of impaired driving causing bodily harm for three reasons:

- alcohol consumption;
- driving speed; and
- the appellant's reaction to road conditions.

[46] The Court went on to conclude:

> [35] After careful consideration, I have reached the conclusion that the trial judge's finding that the appellant's reaction to the icy road showed that he was impaired is an unreasonable inference on the evidence before him, and the type of inference warned against in *Andrews*.

[47] It would be similarly, if not more unreasonable, here to draw an inference that Mr. Glynn was impaired solely because he was involved in an accident.

[48] With respect to smell of alcohol, there was evidence by all witnesses confirming that Mr. Glynn smelled of alcohol. The evidence was unclear as to whether the smell was emanating from his breath or his person but, in any event, it must be recognized that smell of alcohol even from the breath is indicative of consumption, but not necessarily of impairment.

[49] The empty bottle of wine found in or around the vehicle similarly offers evidence of consumption by someone at some point. The evidence is, however, insufficient to conclude that it had been consumed by Mr. Glynn partly or in its entirety that evening.

[50] The behaviours exhibited by Mr. Glynn, including confusion, disorientation, and mood swings, must be acknowledged as being at least potentially consistent with impairment. However, the evidence of Dr. Jamieson was clear that such behaviours are equally consistent with a concussion.

[51] While Nurse Cook testified that, at least in her mind, care of Mr. Glynn shifted from a potential acute injury to intoxication. She also indicated that in the matter of diagnosis, she would defer to Dr. Jamieson. Dr. Jamieson never indicated a change in her working diagnosis of a concussion.

[52] While there is a high degree of suspicion and even likelihood that the behaviours exhibited by Mr. Glynn are indicative impairment, the fact that they are equally consistent with a diagnosis of concussion makes it impossible to conclude impairment beyond a reasonable doubt. I would also note that many of the behaviours exhibited by Mr. Glynn, including being obnoxious and sexually inappropriate, are not generally considered to be indicia of impairment.

[53] Finally, in relation to the readings, a number of cases have been provided to me about what use, if any, can be made of the readings in relation to the question of impairment. As I read the cases, absent an expert to interpret the readings, at worst, I cannot use the readings at all (see *R. v. Letford*, 51 O.R. (3d) 737 (ON C.A.); at best, I

can use them as evidence only of consumption (see *R. v. Randell*, 118 Sask.R. 48; *R. v. Dinelle*, (N.S.C.A.) 74 N.S.R. (2d) 162.

[54] Even the case of *R. v. Laprise*, [1996] 113 C.C.C. (3d) 87 (Que. C.A.), which the Crown seeks to rely on, notes the following:

> ... However, while such results may corroborate the observations of a police officer as to the cause of the decrease in one's ability to drive, it does not permit on its own an inference as to the amount of alcohol consumed or its effects, except where an expert has established a correlation between the result and the possible impairment of one's faculties. ...

[55] No expert has been called in this case. As a result, the readings offer little in establishing impairment. The potential evidence of impairment is simply insufficient, even when considered collectively, to satisfy me beyond a reasonable doubt that Mr. Glynn was impaired, let alone that his ability to operate a motor vehicle was impaired by alcohol. As a result, Count #1 is also dismissed.

[56] My thanks to counsel.

[57] Mr. Glynn, you are free to go.

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RUDDY J.