Citation: *R. v. Knaack*, 2006 YKTC 81

Date: 20060825
Docket: 05–00391
Registry: Whitehorse

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

R e g i n a

v.

Stuart Walter Knaack

Appearances:
Melissa Atkinson — Counsel for Crown
Ed Horembala — Counsel for Defence

REASONS FOR DECISION

[1] Mr. Knaack is charged with having care and control of a motor vehicle while his ability to operate the vehicle was impaired by alcohol (an offence contrary to s. 253(a) of the *Criminal Code*) and with having care and control of a motor vehicle when the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in one hundred millilitres of blood (an offence contrary to s. 253(b)). The events giving rise to these charges took place on October 2, 2005.

[2] At 3:05 a.m. on October 2nd, Valerie Ross, a member of the Whitehorse Citizens on Patrol Program, observed a blue Toyota truck parked on 4th Avenue, in front of the Whitehorse Royal Bank. Its engine was running and its lights were on, although one headlight was not operational. She observed the vehicle again at 3:44 a.m. She looked in the cab of the vehicle and observed a person in the

drivers' seat, slumped over in the direction of the passenger side of the vehicle. She reported her observations to the police.

[3] Constable Buxton-Carr arrived at 3:55 a.m. He observed an individual (whom he later identified as Stuart Knaack) sitting behind the wheel, leaning over towards the right, with both legs in front near the vehicle's pedals. The doors were apparently locked, and the Constable banged on the doors and windows a number of times and yelled at the occupant in order to awaken him. There was no movement for two minutes, then Mr. Knaack straightened up and apparently woke up. In response to the Constable's shouted directions, Mr. Knaack tried unsuccessfully to open the door. He then tried several times to open the window. Finally, he was able to open the window a few inches, enough to allow Constable Buxton-Carr to open the door.

[4] Constable Buxton-Carr detected a strong odour of liquor when Mr. Knaack stepped out of the vehicle. He used the armrest for support as he got out of the vehicle. In response to the Constable's questions, Mr. Knaack spoke very slowly with slurred speech. When standing, his body swayed from side to side.

[5] Based on these observations, the Constable formed the opinion that Mr. Knaack's ability to operate a motor vehicle was impaired by alcohol. He arrested and handcuffed Mr. Knaack at 3:56 a.m. The Constable advised Mr. Knaack of the reason for his arrest and advised him that he would be taken to the detachment to provide breath samples. They arrived at the detachment at 4:01 a.m. – the detachment was only one city block away. Constable Buxton-Carr advised Mr. Knaack again of the reason for his arrest and read the s. 10(b) *Charter* right to counsel to him. The Constable testified that Mr. Knaack was saying things that were unrelated to the circumstances and not responsive to what he was telling Mr. Knaack. When the Constable advised him of his *Charter* right to counsel, Mr. Knaack repeatedly asked, "What good would it do?" Although Mr. Knaack did not expressly ask to speak to a lawyer, the Constable decided to contact duty counsel on his behalf. When the duty counsel called

back at 4:15 a.m., Constable Buxton-Carr related the essential details to her and then passed the telephone to Mr. Knaack. Mr. Knaack spoke to duty counsel in private for 20 minutes. After this telephone call, Mr. Knaack appeared to have better comprehension and was more responsive to the Constable. Constable Buxton-Carr read the formal demand to provide breath samples for analysis at 4:34 a.m., which was 38 minutes after he had formed the opinion that Mr. Knaack was impaired, and arrested him.

[6] Mr. Knaack provided breath samples at 4:47 and 5:10 a.m. The readings were 180 mg%. Mr. Knaack objected to the admissibility of the Certificate of Analysis because the formal demand was not made "forthwith or as soon as practicable" after forming the belief that Mr. Knaack had committed an offence contrary to s. 253(a) of the *Criminal Code.* In fact, the time between forming the belief and making a formal demand in this case was 38 minutes, 20 minutes of which involved Mr. Knaack speaking to duty counsel.

[7] A number of cases have held that a substantial delay between the forming of the requisite belief and the making of the demand will mean that the demand was not made in compliance with s. 254(3). The following cases illustrate this point.

[8] In *R.* v*. Whitesell* (1998), 32 M.V.R. (3d) 318 (B.C.S.C.), a delay of 26 minutes while the officer waited for a tow truck was held not to be "as soon as practicable".

[9] In *R.* v*. Hesketh,* 2003 BCPC 173, the police called duty counsel notwithstanding the accused's clear and unequivocal direction to the contrary. The demand was held not to be made "as soon as practicable". This case is similar to the case at bar, but distinguishable because Mr. Knaack did not state that he did not wish to speak to a lawyer. Rather, Mr. Knaack repeatedly asked the officer, "What good would that do?" In explaining its decision, the court in *Hesketh* (supra) stated (at para. 42):

> 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.

[10] Other cases have accepted that a delay, even a considerable one, could, in all the circumstances, result in a finding that the demand was made as soon as practicable.

[11] "As soon as practicable" means within a reasonably prompt time, not "as soon as possible". In *R.* v. *Squires* (2002), 166 C.C.C. (3d) 65 (Ont. C.A.), a 59 minute wait while the officer satisfied himself that the accused had received medical attention was found to be appropriate.

[12] In *R.* v*. Caprarie-Melville,* [1998] Y.J. 180 (S.C.) the court emphasized that "as soon as practicable" does not mean "as soon as possible". It means "within a reasonably prompt time, under the circumstances". Hudson, J. examined what the police officer was doing during the elapsed time between forming the necessary belief and the breath demand. He found that all of the intervening time was accounted for with the officer acting in the course of duty. He stated, at para. 8:

> The passage of time of 16 or 17 minutes, which is appropriate, and, looking at the evidence, giving the accused the benefit of any doubt, under the circumstances in which the officer was investigating other matters, on the basis of radioed instructions involving the accused dealing with an unexpected witness and taking notes and communicating with other officers in the course of his duty, persuades me that the demand was, in fact, made as soon as was practicable. He looked at the vehicle, I take from the evidence, in an effort to determine whether there was anything there which was capable of being evidence with respect to an accident, which she was informed had taken place -- a collision, I should say. I agree with Crown that if he neglected to do that and, instead, took the time to make the demand, then he would very much be subject to accusations of dereliction of duty, if the

> evidence of a collision turned out to be very temporary and subject to change with the passage of time.

[13] The phrase “as soon as practicable” is also used in s. 258(1)(c)(ii) of the *Criminal Code.* That section requires breath samples to be taken “as soon as practicable” after the time when the offence was alleged to have been committed, but in any event, within two hours.

[14] In *R.* v*. Van Der Veen* (1998), 44 C.C.C. (3d) 38 (Alta. C.A.), the court held that “as soon as practicable” requires the samples to be taken “within a reasonably prompt time under the circumstances”. Numerous decisions have held that the phrase does not require the tests to be taken at the very earliest moment. In *R.* v*. Payne* (1990), 56 C.C.C. (3d) 548 (Ont. C.A.) the test was held to be whether the conduct of the police was reasonable, having regard to all the circumstances.

[15] *R.* v*. Litwin,* [1997] O.J. No. 4242 (Sup. Ct. Just.), was also a case decided pursuant to s. 258(1)(c)(ii). After the police made a breathalyzer demand, Litwin was asked if he understood his right to call counsel and if he wanted to speak to duty counsel. His response was to the effect of “Yes, I understand, but it’s not necessary”. Out of an abundance of caution, the police placed a call to duty counsel on Litwin’s behalf. A 71 minute delay resulted, while the police waited for duty counsel to call back. It was clear that the police effort to facilitate contact with counsel was motivated by a desire to avoid compromising Litwin’s s. 10(b) *Charter* right to counsel. The court concluded (at para. 36):

> Mr. Litwin’s breath samples were taken, in my view, reasonably promptly in the circumstances. It was reasonable and prudent for Cst. Latter to delay the breath tests until after the accused had spoken to duty counsel despite the absence of any request by the accused to do so. That being the case, I am satisfied that the breath tests were conducted "as soon as practicable", within the meaning given those words by the Court of Appeal.

[16] *R.* v. *Davidson,* [2005] O.J. No. 3474 (Sup. Ct. Just.) is a leading authority that sets out guidelines for interpreting “as soon as practicable” (at para. 20):

> The decisional law builds in some flexibility in determining whether breath tests were administered as soon as practicable, in terms of permitting periods of delay that are found to be justified as reasonable in the circumstances. However, a delay will not be reasonable where there is no legitimate basis to support the delay. If the circumstances of a particular case do not show that it was reasonable to take the time to contact duty counsel, then provided the delay is of more than a very minor nature, the tests will not have been administered as soon as practicable.

[17] In the case at bar, it was not argued by the Crown that the information given to the accused at the time of his arrest amounted to a formal demand. The accused was, however, advised of the reasons for his arrest and the fact that he would have to go to the police detachment to provide breath samples. Constable Buxton-Carr gave Mr. Knaack his s. 10(b) *Charter* warning at the detachment prior to making the formal demand for a breath sample. The appropriateness of giving an accused his *Charter* rights before making a formal breath demand was considered in *R.* v*. Befus,* [1997] A.J. No. 1064 (Alta. Prov. Ct.).

[18] In *Befus* (supra), the formal demand for breath samples was made after the accused was given his s. 10(b) *Charter* right, and a lapse of some 16 minutes occurred, during which time he spoke to counsel. It was argued that this delay occasioned by his speaking to counsel, resulted in the formal demand not being made forthwith or as soon as practicable. The court held that the delay resulting from the accused exercising his right to counsel was a reasonable one and that the subsequent formal demand was made in compliance with s. 254(3) of the *Criminal Code*. The Certificate of Analysis was admitted into evidence and the accused was convicted.

[19] There is some merit in postponing the reading of the formal demand until after the accused has been given his s. 10(b) *Charter* right and has decided whether to exercise it. As pointed out in the *Befus* decision, supra (at paras. 15-17):

> On the one hand, the detainee is told he has the right to telephone a lawyer. On the other, he is told that he must accompany the officer for tests, failing which, he may be charged. Given the expected nervousness associated with arrest together perhaps with some degree of intoxication, the reading of the demand along with the Charter rights may well present a detainee with a conflict between his rights and his obligations.
>
> Indeed, it could come as no surprise if it seemed to a detainee that he or she had to choose between either exercising the right to counsel or going with the officer in compliance with the demand.
>
> There is one related but even more pressing reason for postponing the reading of the demand until after the detainee has exercised his or her right to contact counsel, should one choose to do so. That is, that having informed a detainee of the right to counsel, it is improper for the arresting officer to then continue to investigate and pursue the collection of evidence, until the detainee has first had access to counsel.

CONCLUSION

[20] The important facts of the case at bar are as follows:

- The accused was arrested at the scene and was advised of the reasons for his arrest.
- He was also told that he would have to attend at the police station to provide some breath samples.
- At the detachment, he was again advised of the reasons for his arrest and was given his s. 10(b) *Charter* right to counsel.
- Based on his non-responsive statements as well as repeated questions of the officer demanding what good would it do to talk to

counsel, Constable Buxton-Carr decided to put Mr. Knaack in touch with duty counsel.

- Mr. Knaack spoke to duty counsel for 20 minutes.
- Immediately thereafter, the Constable made a formal demand for breath samples and Mr. Knaack complied.
- A total time of 38 minutes elapsed from the officer forming the requisite opinion and the making of a formal breath demand, of which 20 minutes is attributable to the accused speaking to counsel.

[21] It is apparent that Mr. Knaack did not decline to speak to counsel. There was certainly no clear and unequivocal waiver.

[22] Moreover, it was quite proper for Constable Buxton-Carr to decline to answer Mr. Knaack's repeated questions concerning the utility of speaking to counsel. Had he responded to the questioning, he could be criticized for giving legal advice or possibly for improperly influencing Mr. Knaack's decision to contact counsel.

[23] Mr. Knaack's state of intoxication and his repeated questioning of the officer asking, "What good would it do" to speak to counsel, gave the Constable a reasonable basis to conclude that Mr. Knaack did not fully comprehend his s. 10(b) rights.

[24] In these circumstances, it was reasonable for the officer to initiate contact with legal counsel on Mr. Knaack's behalf. In fact, as Mr. Knaack spoke to duty counsel for some 20 minutes, it is apparent that he exercised his right to counsel.

[25] In these circumstances, the delay in making the formal demand was reasonable. All of the elapsed time was accounted for. All of the police officer's actions were properly in the execution of his duties. His actions were consistent

with the importance placed on the s. 10(b) right to counsel by the appellate courts. Mr. Knaack was not prejudiced in any manner by the procedure adopted by Constable Buxton-Carr.

[26] In the result, I find that the formal demand for breath samples were made "as soon as practicable" and in accordance with the provisions of s. 254(3) of the *Criminal Code*. The Certificate of Analysis is admissible.

Lilles, T.C.J.