Citation: *R. v. Schafer,* 2018 YKTC 12

Date: 20180319
Docket: 17-00735
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

CHRISTOPHER RUSSELL SCHAFER

Appearances:
Noel Sinclair — Counsel for the Crown
Kelly Labine — Duty Counsel for the Defence

REASONS FOR JUDGMENT

[1] Christopher Schafer is the defendant in a s. 810.2 peace bond application. On February 15, 2018 Mr. Schafer was released from serving a custodial disposition. He was released in British Columbia and returned to the Yukon on March 2, 2018.

[2] Upon his return he was immediately arrested on a warrant that was issued by Territorial Court Deputy Judge White with respect to the peace bond information. Mr. Schafer was brought before a justice of the peace on March 3, 2018 and remanded over to appear before me for a bail hearing on Monday, March 5, 2018. The substantive peace bond application is set down for Friday, March 16.

[3] On March 5, Crown counsel indicated that he was prepared to run a show cause hearing. However, over the objection of duty counsel acting for Mr. Schafer, the matter was adjourned to allow for a Bail Assessment Report to be prepared, in order to determine whether there were terms of release that were appropriate for Mr. Schafer pending the hearing of the s. 810.2 application. Crown counsel stated that there was little at present in the way of a release plan that would satisfy the Crown's concerns but, if an appropriate plan was put forward, the Crown might be in a position to consent to Mr. Schafer's release.

[4] Of particular concern to the Crown was Mr. Schafer's plan to return with his parents to his home community of Old Crow. A letter was filed with the Court that set out the community's opposition to Mr. Schafer being allowed to return to the community, and the reasons for this opposition. A petition from community members was attached to this letter.

[5] In anticipation of the judicial interim release hearing, Crown counsel filed materials with the Court, including the cases of ***R.*** v. ***Penunsi***, 2018 NLCA 4 and ***R.*** v. ***Nowazek***, 2017 YKSC 8.

[6] Prior to commencing the bail hearing, I raised the issue of whether there was jurisdiction to arrest Mr. Schafer. I did so, as the Court of Appeal in ***Penunsi*** stated that no jurisdiction to arrest exists in s. 810.2 applications, concluding in paras. 78-80, after extensive analysis, as follows:

> 78 In summary, the provisions of Part XVI (compelling appearances) are inconsistent with the peace bond provisions in Part XXVII of the *Code*. As well, the modifications to the language of sections 515 and 507 of the

> *Code* required to enable a justice to subject a defendant to a section 810.2 peace bond proceedings to a show cause hearing are substantial and well beyond the substitutions of detail envisioned by the language in section 810 and 795 -- they are of such a nature and character as to effectively alter the law respecting the power of arrest.
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> 79 In the result, a judge cannot compel the appearance of a defendant to a section 810.2 Information by issuing a warrant of arrest. If an informant has reasonable and probable grounds to believe there is a substantial risk that an imminent and specific serious personal injury offence will be committed, a charge under section 495 can be laid and the alleged offender arrested if indicated. Fears based on more general concerns about a person's history of violence as a predictor of future conduct can be addressed by laying a section 810.2 peace bond Information, summonsing the defendant to appear, hearing the merits of the Informant's fear, and determining whether the defendant ought to be required to enter into a recognizance.
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> 80 Finally, I would observe that there was a simpler way to address public safety concerns about Mr. Penunsi committing "a serious personal injury offence" upon his release. That simpler way was to have him summoned to appear at an earlier date so that a merits hearing could take place prior to his release from prison.

[7] In the absence of jurisdiction to arrest, there is also no jurisdiction to release a defendant to a s. 810.2 application on bail terms. As stated in para. 35 of ***Penunsi***:

> If a person is brought before a judge under an arrest warrant and he or she is not otherwise in custody, it goes without saying that he or she remains under arrest until released by the judge. (See the lucid reasoning in *R.* v. *Nowazek*, 2017 YKSC 8 at paras. 18 to 23 on this point.) Under section 515(1) of the *Code*, a judge is required to release an accused or a defendant on an undertaking to appear "unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, *in respect of that offence*, why the detention of the accused in custody is justified or why an order under any other provision of [section 515] should be made".

[8] The lucid reasoning the Court of Appeal refers to in ***Nowazek*** is captured in that decision, at paras. 22-23:

> 22 It is true that some of the language in these decisions could be construed as supporting the Crown's argument that the Judge could order

Mr. Nowazek to enter into a recognizance. However, it is important to note that in all of these cases, the subject of the s. 810 hearing had been arrested, they had not simply appeared in response to a summons. Moreover, the language in s. 515 clearly and repeatedly contemplates an accused who is in custody and is seeking release. As such, while these cases make it clear that s. 515 is applicable to s. 810 hearings, they do not provide that s. 515 gives a judge jurisdiction to impose a recognizance on a person who, like Mr. Nowazek, is not in custody.

23 I am comforted in this conclusion by the decision of Cournoyer J. in *R.* v. *Goikhberg* 2014 QCCS 3891, [2014] Q.J. No. 8164, where he stated:

> 50 A plain reading of Part XVI therefore reveals that a person may be compelled to appear before a justice to answer to a criminal charge without the person being detained in custody but "[t]he route that an individual will typically travel to the courtroom depends on whether the police decide to carry out an arrest and hold the person in custody for a bail hearing, or decide instead to pursue less coercive options for compelling the person's attendance in court".
>
> 51 In short, the police may compel the appearance of a person by means of an appearance notice, a promise to appear or a recognizance.
>
> 52 The police may also use a court-issued process: a summons or an arrest warrant unless it proceeds to arrest the person without a warrant. A summons is the preferred mechanism unless there are reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.
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> 53 Pursuant to s. 503, a person arrested with or without a warrant is detained in custody and is to be taken before a justice to be dealt with according to law.
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> 54 A summons serves the purpose of Part XVI of compelling the person to appear before the court. Form 6 of the *Criminal Code* commands the person to attend court and to attend thereafter as required by the court, in order to be dealt with according to law.
>
> 55 A summons has nothing to do with judicial interim release because in such a case, the person is not taken before a justice but appear before the court under the compulsion of the summons. The person is not in custody. There is no

> implicit or unsigned undertaking to appear. The person is legally compelled to appear. [Emphasis added]
>
> 56 In contrast, the accused released under s. 515(1) has to give an undertaking without conditions pursuant to Form 12 or with conditions under s. 515(2) depending on the circumstances. Form 12 makes it clear that the undertaking is made in order to "be released from custody". The undertaking is to attend court at a specified date and to attend after that as required by the court.
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> 57 Again, the sole difference between a person compelled by a summons and a person release under s. 515(1) is that, in the latter case, the person is released from custody which is unnecessary in the former case because the person is not in custody. [Emphasis added]
>
> ...
>
> 85 Again, a person who appears compelled by a summons does not have to be released because she is not detained in custody. Such a person is not taken before a justice to be dealt with according to law, but merely compelled to attend court. [Italicized emphasis in the original. Underlined emphasis added.]

24 Thus, I conclude that as Mr. Nowazek had not been arrested and the RCMP lacked the necessary grounds for his arrest, it was a jurisdictional error for Judge Block to impose a recognizance on him.

[9] The Court in *Penunsi* further set out its reasoning at para. 69:

> The reasonable grounds required to arrest a person who is alleged to have committed an offence are twofold: (1) the informant must have the subjective belief that an offence was committed and (2) the informant's grounds for that belief must meet objective evaluation. According to *Brown*, reasonable grounds to arrest a person who is about to commit an offence require both subjective belief in a substantial risk of an imminent specific offence being committed and that those grounds pass objective evaluation. By contrast, section 810.2 requires "a fear based on reasonable grounds that a person will commit a serious personal injury offence". These words require a judge to evaluate whether an informant's fear that a serious personal injury offence of an unspecified nature and in respect of unspecified persons will be committed at some unknown point in time or place is based on reasonable grounds. The reasonable grounds

> required to lay a section 810.2 Information are of a lesser quality than those that *Storrey* stipulates are required to execute an arrest. Fear that something will happen, even if based on reasonable grounds, is lower than belief that something has happened or will imminently happen. The kind of details that are required to lay an Information alleging the commission of a criminal offence -- respecting time, place, victims, and what happened, are not required in order to lay a section 810.2 Information. These details are the very factors that enhance the reasonableness of reasonable grounds and enable objective evaluation of whether charges should be laid and warrants of arrest ought to be issued. In the absence of such details, fear can still be reasonable. But such fear, though genuine and not unreasonable, leaves the power of arrest susceptible to abuse which in turn can jeopardize freedom. Interpreting section 810.2(2) to include the power of arrest would make it easier to arrest a person for not committing an offence than it would be to arrest a person for committing an offence. Arresting persons on the lower standard of fear is not in accordance with the jurisprudence respecting grounds for arrest and would not, in my view, provide the necessary "important protection" from "the abuses and excesses of a police state" (*Storrey*, at page 249).

[10] Ultimately, the Court in ***Penunsi*** rejected the reasoning in the cases of ***R.*** v. ***Allen*** (1985), 18 C.C.C. (3d) 155 (Ont. C.A.), ***R.*** v. ***Budreo*** (2000), 142 C.C.C. (3d) 225 (Ont. C.A.), ***R.*** v. ***Wakelin*** (1992), 97 Sask. R. 275 (C.A.), and ***R.*** v. ***Cachine***, 2001 BCCA 295.

[11] In ***Allen***, the trial judge had concluded that a warrant for arrest was improperly issued because s. 745 (now 810), under which the warrant was issued does not create an offence and, as such, a warrant under s. 455.3(4) (now 507) could not be issued, as such a warrant could only issue when there is an offence alleged. On appeal, the Court disagreed, stating that:

> Where proceedings are instituted under s. 745, they constitute proceedings under Part XXIV of the Code notwithstanding the fact that the section does not create an offence and accordingly the provisions of Part XIV are made applicable thereto pursuant to s. 728.1 [now s. 795].

> Regard must then be had to Part XIV of the Code and, in particular, to s. 455(3)(4) where a justice is given the power to issue a warrant in the circumstances therein stated and in our view that section is applicable to a proceeding under s. 745. We find, therefore, that the warrant issued in this case was a valid warrant, properly issued.

[12] In ***Budreo***, the Court was dealing with a s. 810.1 application. The Court, in dealing with the issue of the applicability of ss. 507(4) and 515 of the *Code* to s. 810.1 applications, referred favourably to the decision in ***Allen***, stating in para. 62:

> The appellant asked us to reconsider Allen on its own terms or in the light of the Charter. In my view, Allen was correctly decided. Applying provisions relating to a charge against an accused (ss. 507(4) and 515) to a proceeding commenced by the laying of an information (s. 810.1) is a modification contemplated by s. 795 of the Code. I am supported in this conclusion by the decision of the Saskatchewan Court of Appeal in R. v. Wakelin (1992), 71 C.C.C. (3d) 115, 97 Sask. R. 275 (C.A.), which reached a similar result.

[13] The Court, noting ***Allen*** to have been decided pre-***Charter***, also found that there was no s. 7 *Charter* breach in this regard, stating in paras. 63-64:

> [63] Allen, however, was decided without reference to the Charter. The appellant submits that applying ss. 507(4) and 515 to a s. 810.1 proceeding violates s. 7 of the Charter. The argument has two branches: both permitting pre-hearing arrest and detention because of a fear of future misconduct and permitting a more severe sanction pending the hearing than could be ordered at the conclusion of the s. 810.1 hearing violate the principles of fundamental justice. I disagree.
>
> [64] First, the presiding judge has a discretion whether to issue a warrant for the arrest of a defendant or to detain a defendant pending a hearing. If a defendant is released pending a hearing, the judge has discretion concerning the bail conditions to be imposed. The existence of this judicial discretion is, as I have already said, an important constitutional safeguard and procedural protection for the defendant. The presiding judge has ample authority to balance the interests of the defendant and the interests of the public pending a s. 810.1 hearing and to ensure that the hearing is held promptly. Second, and repeating what I said earlier, provision for pre-

> hearing arrest and detention is needed to preserve the integrity of the s. 810.1 proceedings. The court may need the power of arrest and detention to ensure the attendance of a defendant at the hearing or to protect children from the possibility of serious harm pending the hearing.

[14] In ***Cachine***, the Court considered the issue of whether a provincial court judge "…has jurisdiction to impose bail conditions on a person against whom an information has been sworn for a peace bond under s. 810.2 of the Criminal Code" (para. 1). The court considered and rejected the decisions in ***MacAusland*** v. ***Pyke*** (1995), 139 N.S.R. (2d) 142 (N.S.S.C.), and ***R.*** v. ***Forrest***, (1983), 8 C.C.C. (3d) 444 (B.C.S.C.), the two decisions referred to favourably in ***Penunsi***.

[15] The B.C. Court of Appeal accepted the reasoning in ***Wakelin***, which had adopted the reasoning in ***Allen***. The court also cited favourably the reasons in ***Budreo***.

[16] In ***Wakelin***, the trial judge, in finding the arrest of the offender pursuant to an information laid under s. 810 unlawful, relied on the reasoning in ***Forrest*** to conclude that there was no power to arrest. On appeal, the Court, overturned the decision of the trial judge, rejecting the reasoning in ***Forrest*** and adopting the reasoning in ***Allen***. Jackson J.A. wrote in ***Wakelin***:

> We prefer this reasoning [in *Allen*] to that of Hinds J. Subsection 810(5) incorporates by reference all of the provisions relating to summary conviction offences generally. Section 795 makes the provisions of Part XVI apply to summary conviction offences "with such modifications as the circumstances require". Part XVI refers throughout to an "accused". It is reasonable to conclude that a required modification to make to s. 515 to make it applicable to s. 810 is to read "accused" in s. 515 as including a person against whom an information has been laid under s. 810.

> Accordingly, the phrase in s. 515 which is "an accused who is charged with an offence" does not mean that it is inapplicable to proceedings under s. 810.

[17] In considering the construction of s. 795, and in particular whether the words "with respect to compelling the appearance of an accused before a justice" limited the application of Part XVI to only those sections relating to process, the Court stated:

> …it seems that the omission in s. 795 [i.e. no reference to provisions governing judicial interim release] cannot be construed as limiting the applicability of Part XVI to proceedings under Part XXVII. There is no good reason to deny access to the judicial interim release provisions to s. 810, as long as s. 810 remains part of the Criminal Code. Having concluded as I have above that the power to issue a warrant applies with respect to proceedings under s. 810, it would be anomalous if the judicial interim release provisions did not apply. …

Analysis

[18] I wish to say at the outset that the issue of jurisdiction to arrest was not fully argued before me. Despite filing ***Penunsi,*** Crown counsel was not aware that duty counsel for Mr. Schafer on the show cause was questioning this jurisdiction until I raised the issue in Court and specifically asked counsel for Mr. Schafer about her position.

[19] As such, I understand and assume, perhaps incorrectly, that the cases were filed by Crown counsel in anticipation of an argument that I could not place Mr. Schafer on release conditions. The ***Budreo*** case was the only case filed by counsel for Mr. Schafer and the highlighting was in reference to those portions dealing with the issue of the exercise of judicial discretion under s. 515 "…bearing in mind the limited conditions that can be imposed following a successful s. 810.1 application" (para. 67).

[20] Therefore, while I am making a ruling on jurisdiction today, I bear in mind the limited nature of the argument before me, the time within which I have had to make this decision, and the present circumstances of Mr. Schafer as an individual held in custody, in the absence of any allegation of his committing a criminal offence or being about to commit an indictable one in the imminent future.

[21] As such, I am saying that on a different day, with a more complete argument before me and more time to consider the issue, I may come to a different conclusion than here.

[22] Crown counsel has submitted that I am bound to follow the decision in ***Nowazek***, and that ***Nowazek*** holds that there is the authority to issue a warrant to compel the attendance of a defendant to a peace bond information. This is because Ducharme J. found that, while Mr. Nowazek, who was brought before the court on a summons, could not be placed on bail conditions, he could have been subject to conditions had he been brought before the Court on a warrant.

[23] Counsel specifically referred to para. 22

> It is true that some of the language in these decisions could be construed as supporting the Crown's argument that the Judge could order Mr. Nowazek to enter into a recognizance. However, it is important to note that in all of these cases, the subject of the s. 810 hearing had been arrested, they had not simply appeared in response to a summons. Moreover, the language in s. 515 clearly and repeatedly contemplates an accused who is in custody and is seeking release. As such, while these cases make it clear that s. 515 is applicable to s. 810 hearings, they do not provide that s. 515 gives a judge jurisdiction to impose a recognizance on a person who, like Mr. Nowazek, is not in custody.

[24] And see also para. 24:

> Thus, I conclude that as Mr. Nowazek had not been arrested and the RCMP lacked the necessary grounds for his arrest, it was a jurisdictional error for Judge Block to impose a recognizance on him.

[25] I agree that I am bound insofar as I cannot, in circumstances where a defendant on a s. 810 – 810.2 application is before the court on a summons, place the individual on bail conditions. (I understand that the Crown has filed an appeal of the ***Nowazek*** decision on this point and that the appeal is to be heard in May 2018).

[26] I disagree, however, that Justice Ducharme made a finding that the issuance of an arrest warrant for s. 810 – 810.2 proceedings is within the jurisdiction of a territorial court judge. He did not directly address the issue or conduct any analysis of it. At most, he simply distinguished an individual who is in court on a summons from someone who has been arrested.

[27] While I share many of the concerns expressed by the Court in ***Penunsi*** and recognize that the Court went a great deal further in conducting an analysis of the statutory provisions as per the principles of statutory interpretation than the courts in the other cases cited, I find that, subject to the considerations I stated earlier, that at this time I concur with the conclusion reached in the decisions of ***Wakelin***, ***Allen***, ***Budreo*** and ***Cachine***.

[28] I find that the purposive approach to statutory interpretation, which requires that I interpret legislation in a manner which gives effect to the intention behind the legislation, leads me to the conclusion that a defendant in a peace bond application can be compelled to attend in court by either a summons or a warrant for arrest.

[29] While I appreciate that it is perhaps possible to bring the application and proceed to a hearing before an individual is released from custody, the reality is that it may simply not be practical to do so. Information may not be available at the time to indicate what the defendant's plans are upon release. It may be that the defendant is not in custody at all at the time that the concern arises.

[30] In the present case, there is some basis for a consideration that the expressed intent of Mr. Schafer to return to Old Crow triggered an application that may not have been brought had he decided to stay in British Columbia. Old Crow is a remote and isolated community in the Yukon, without road access and without a strong infrastructure with respect to treatment and supports. Crown counsel was not in a position to know or speculate on what may have happened with respect to the commencement of a s. 810.2 application in British Columbia if Mr. Schafer had decided to remain there.

[31] My conclusion about a warrant being available is supported in part by the wording contemplating the issuance of a summons. The jurisdiction to issue a summons is also ultimately found in s. 507(4), and also speaks to "an accused" and "a charge of an offence". In order to issue a summons on a s. 810.2 application, the section must be "modified" in the same way as is required to issue a warrant for arrest. If I can read in language about "a defendant" and "a peace bond information" for a summons, I must be able to do so for a warrant for arrest. I appreciate that there is a distinct "necessary in the public interest" test for a warrant and greater consequences on a defendant's liberty, but this does not alter the modification required to the section.

[32] It is to be remembered that the issuance of a warrant for arrest is still within the discretion of a judicial officer. It is not to be presumed that a warrant for arrest will be commonly issued in the context of peace bond informations. In many, if not most cases, a summons may well remain the process which compels the attendance of a defendant in court on a specified date.

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COZENS T.C.J.