Citation: *R. v. Wheeler,* 2010 YKTC 7

Date: February 10, 2010
Docket: 08-00354
Registry: Whitehorse

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

REGINA

v.

EDDY JASON WHEELER

Appearances:
Ludovic Gouaillier — Counsel for Crown
Ed Horembala — Counsel for Defence

RULING ON *VOIR DIRE*

Introduction

[1] Eddy Jason Wheeler is charged with having committed an offence contrary to s. 280(1) of the *Criminal Code*.

[2] During the trial, a *voir dire* was entered into in order to determine the admissibility of a statement provided by Mr. Wheeler to RCMP Cst. Smith on May 17, 2008. Defence counsel challenged the admissibility of the statement on the basis that it was not voluntary and that it was taken in breach of Mr. Wheeler's s.10(b) *Charter* rights.

[3] Cst. Smith and Cst. Fenske were the only witnesses to give evidence on the *voir dire*. A DVD recording of the statement was played at trial and a copy of the transcript of the statement, as well as the DVD recording, were filed as exhibits.

[4] At the conclusion of the *voir dire*, I ruled the statement admissible. These are my reasons for that ruling.

Overview

[5] On May 9, 2008, Mr. Wheeler drove K. S., D. C., and Kayla Mintz, at their request, from Carmacks to Whitehorse. They stayed overnight in the same room at a hotel in Whitehorse and returned to Carmacks the following day. K. S. was 14 years old at the time and, while residing with her mother, M. J., was in the care and custody of the Director of Family and Children's Services. Mr. Wheeler did not seek to obtain permission from either M. J. or the Director prior to taking K. S. to Whitehorse.

[6] On the morning of May 10, 2008, M.J. made a complaint to the RCMP about K. S. having been taken to Whitehorse by Mr. Wheeler. Cst. Smith spoke to Mr. Wheeler by telephone briefly on the morning of May 10, 2008. On May 17, 2008, Mr. Wheeler attended the RCMP Detachment in Carmacks and provided a statement to Cst. Smith.

[7] The Information charging Mr. Wheeler with having committed the s. 280(1) offence was sworn on August 13, 2008.

Evidence

Cst. Smith

[8] Cst. Smith was the lead investigator on the file. He testified that he had interviewed M. J. and Social Worker Janice Wick on May 12, 2008, and that after these interviews he had commenced a criminal investigation into the events surrounding the May 9 trip to Whitehorse.

[9] On May 16, 2008, Mr. Wheeler attended the Detachment in Carmacks. Mr. Wheeler stated that he had heard rumors and wished to give his side of the story to clear the air. On May 16, Mr. Wheeler was told that Cst. Smith was

unavailable and to come back the next day. Cst. Smith subsequently phoned Mr. Wheeler and told him that if he wanted to give a statement he could come to the RCMP Detachment and do so. Cst. Smith denied in cross-examination that he had generally let it be known that he wished to speak to Mr. Wheeler. He stated that Mr. Wheeler initially approached the RCMP.

[10] On May 17, 2008, at approximately 4:00 p.m., Mr. Wheeler attended at the Detachment. Cst. Smith was on the road in his police cruiser at the time but returned to the Detachment within five minutes when advised that Mr. Wheeler was waiting for him. When Cst. Smith arrived at the Detachment, Mr. Wheeler was sitting on a bench in the lobby.

[11] Mr. Wheeler was taken into the standard interview room at the Detachment by Cst. Smith, who explained to Mr. Wheeler that he was not detained and he could leave at any time. Cst. Smith testified that Mr. Wheeler said that he understood this. Cst. Smith did not read Mr. Wheeler his s. 10(b) *Charter* rights as, in his opinion, Mr. Wheeler was not detained.

[12] Cst. Smith read verbatim the police warning to Mr. Wheeler, who indicated that he understood. Cst. Smith read the police warning to Mr. Wheeler because he considered Mr. Wheeler to be a suspect in the commission of a criminal offence. Cst. Smith did not provide a secondary or “purge” warning to Mr. Wheeler, although Cst. Smith was aware that Mr. Wheeler had spoken with someone from the Whitehorse RCMP Detachment on May 10, as well as with himself that same day.

[13] Mr. Wheeler was sober and acting in a normal manner. Cst. Smith believed that Mr. Wheeler wanted to tell his story and that he was capable of doing so.

[14] The interview, which was audio and videotaped, progressed from Mr. Wheeler providing his version of events to, after a break, Cst. Smith questioning Mr. Wheeler more aggressively, both in tone and demeanour, in an attempt to obtain inculpatory information from Mr. Wheeler. Cst. Smith agreed that many of these questions were asked as a result of techniques he had learned that were designed to elicit incriminating information from an interviewee.

[15] The interview lasted just over 30 minutes. Mr. Wheeler was not arrested and left the Detachment after the interview was concluded. Cst. Smith testified that there were no promises and threats made to Mr. Wheeler throughout his interaction with him.

Cst. Fenske

[16] Cst. Fenske was in the Detachment when Mr. Wheeler attended it on May 17. He had no conversation with Mr. Wheeler other than to direct him to wait on the lobby bench until Cst. Smith arrived. Cst. Fenske's role in the interview between Cst. Smith and Mr. Wheeler was limited to external monitoring of portions of the interview and suggestions to Cst. Smith during a break in the interview with respect to the use of confrontational interviewing techniques.

[17] Cst. Fenske testified that he was aware that Cst. Smith, as the lead investigator on the file, wished to speak to Mr. Wheeler prior to the interview on May 17.

Analysis

Voluntariness

[18] The onus is on the Crown to prove beyond a reasonable doubt that the statement made was voluntary. At the core of the voluntariness determination is the question as to whether Mr. Wheeler provided the statement of his own free will, or whether the actions of Cst. Smith and Cst. Fenske raises a reasonable doubt as to whether Mr. Wheeler's exercise of free will was negated.

Right to Counsel

[19] Defense bears the burden of establishing that Mr. Wheeler's s. 10(b) *Charter* right to counsel was breached. The critical issue for consideration in this case is whether Mr. Wheeler was detained by Cst. Smith. If Mr. Wheeler was detained, then his right to counsel was triggered. It is clear that the facts of this case do not give rise to an investigative detention of the type that does not require that the right to counsel be provided.

Application of law to the facts

[20] Counsel points to the following factors set out in the case of ***R.*** v. ***Moran*** (1987), 36 C.C.C. (3d) 225 (Ont. C.A.), at pp. 258-259 as being applicable in determining whether an individual has been detained:

1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;
2. whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;
3. whether the accused left at the conclusion of the interview or whether he or she was arrested;
4. the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;
5. whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;
6. the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;
7. the subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether

> he or she *reasonably* believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.

[21] On May 17, 2008, Mr. Wheeler, although not arrested, was clearly a suspect in the alleged commission of an offence under s. 280(1). The investigation into whether an offence had been committed was underway, and M. J. and Ms. Wick had been interviewed. The RCMP were clearly interested in speaking to him.

[22] In applying the above principles from ***Moran***, the following is to be noted:

- It is clear from the evidence that Mr. Wheeler chose to approach the RCMP of his own accord. The RCMP did not track him down in town or make it known generally that he needed to speak to them. While he was not given a choice as to where he wanted to be interviewed, he effectively chose the place and time for the interview of his own volition. To some extent, his decision to attend at the RCMP was his response to knowledge he had of RCMP interest in his involvement in the matter being investigated. It was not, however, in response to a request initiated by the RCMP, notwithstanding that the interview took place after Cst. Smith contacted Mr. Wheeler;
- Mr. Wheeler was told prior to the interview that he could leave at any time, and, while this information was not repeated at any time during the interview, Mr. Wheeler left the Detachment without being arrested at the conclusion of the interview;
- I find that the interview was conducted as part of a general RCMP investigation into whether a crime had, in fact, been

committed. There is no doubt, however, that Cst. Smith knew at the time he conducted the interview that, if a crime had been committed, Mr. Wheeler was the offender and, further, that the interview clearly progressed into attempts by Cst. Smith to have Mr. Wheeler incriminate himself in the commission of a crime, not only with respect to the commission of a possible s. 280(1) offence, but of other serious offences, including sexual contact with a 14 year old youth, as well as offences related to the provision of alcohol to minors;

- Objectively viewed, Cst. Smith may well have had sufficient grounds, based on the information he had at the time, to detain or arrest Mr. Wheeler, which would have then required him to provide Mr. Wheeler his s. 10(b) *Charter* right to counsel. From a review of the entirety of the circumstances, however, I am not satisfied that Cst. Smith knew or even ought to have known that he possessed the requisite reasonable and probable grounds at the time of the interview to believe that an offence had been committed by Mr. Wheeler. In this regard, I note that the Information charging Mr. Wheeler was not sworn until approximately three months after the interview was conducted. I say this recognizing that there was no evidence before me of further investigative efforts resulting in additional incriminating evidence against Mr. Wheeler, prior to the decision to swear an Information charging Mr. Wheeler; and

- As Mr. Wheeler did not testify on the *voir dire*, I do not have any direct evidence as to his subjective belief that he was detained. From an objective viewpoint, however, there is nothing in the demeanour of Mr. Wheeler on the videotape or in the extrinsic circumstances that would cause me to have

> any concerns that he may have thought that he was detained by the RCMP and unable to leave the Detachment at any time that he chose to do so.

[23] Defence counsel points to the following comments made by Cst. Smith to Mr. Wheeler when conducting the interview, stating that these comments were somewhat akin to inducements and were inappropriately misleading:

- This is your opportunity to come clean on it;
- How do you think that's going to look in Court if you're having sex with a fourteen year old girl;
- And its not like you took her and raped her, okay, consensual sex is one thing, and that's what I'm trying to tell you here, if you want to come clean with me I'm here to listen to you;
- And that's your opportunity;
- So here's your opportunity. I mean I'm the nice guy here;
- All right well you know what its going to be, its going to be your word against, against everyone's else's then;
- But I'm giving you the opportunity now to distinguish the difference between rape and abduction and consensual sex with a young girl; and
- Okay, consensual sex with a fourteen year old is not a big deal, taking a girl out of town, abducting her and raping her, that's a big deal, okay.

[24] There is no doubt that Cst. Smith strayed into questionable territory when he made comments that could be viewed as misleading Mr. Wheeler to believe that this was his opportunity, perhaps implicitly his only opportunity, to "come clean" regarding the events that transpired. Obviously Mr. Wheeler would have further opportunities in the legal process to provide his version of events, should he chose to do so.

[25] Even more concerning are the comments that spoke of "consensual sex" with a fourteen year old, which is, of course, incorrect in law as, pursuant to s. 151.1(2) of the *Code*, consent is not a defense to a charge under ss. 151, 152,

173(2) or 271. The *Tackling Violent Crime Act* 2008, R.S.C., c. 6, s. 13(1) which raised the age of consent specified in s. 150.1(1) from 14 to 16 years of age, came into force on May 1, 2008, just over one week prior to the date of the alleged offence.

[26] Comments made by police officers to an individual being questioned that inform the individual as to potential legal consequences or impacts, in particular when the information is inaccurate, can result in a subsequent statement being ruled as inadmissible at trial.

[27] Despite my concerns regarding some of the comments made by Cst. Smith to Mr. Wheeler, however, I find that they did not have the consequential effect, through either inducement or coercion, of causing Mr. Wheeler to provide any portion of his statement involuntarily, or otherwise result in a breach of his s. 10(b) *Charter* rights. Errors or inappropriate interviewing techniques used by police officers do not automatically result in a statement being ruled involuntary or as having been obtained through a breach of a *Charter* right. The errors or inappropriate techniques must be viewed in the whole of the context in which a statement is provided, in order to determine whether the effect of the errors or inappropriate techniques was to cause or contribute to an individual providing an involuntary statement or a statement following a breach of his or her s. 10(b) *Charter* rights.

[28] I find that Mr. Wheeler attended at the RCMP Detachment in Carmacks of his own accord and not in response to any action by the police that compelled him to attend. He was not detained at any time and was free to leave as he wished. The actions of Cst. Smith, although increasingly aggressive in style and designed to obtain inculpatory evidence from Mr. Wheeler, as well as straying over the line in respect of comments regarding potential legal issues, did not, however, result in Mr. Wheeler providing an involuntary statement or result in a breach of Mr. Wheeler's s. 10(b) *Charter* rights.

[29] Further, with respect to the alleged s. 10(b) *Charter* breach, given that Mr. Wheeler was not detained, there was no automatic triggering of his right to contact legal counsel. I agree that there is some merit to the argument that Mr. Wheeler should perhaps have been provided an opportunity to contact counsel prior to being interviewed. This is due to the fact that Mr. Wheeler was the only possible suspect in the potential commission of a criminal offence and the interview was conducted in a manner intended to obtain inculpatory evidence from him. Providing Mr. Wheeler an opportunity to contact counsel would have been one additional step towards ensuring that any subsequent statement would be ruled admissible in the face of a challenge.

[30] Certainly, providing Mr. Wheeler an opportunity to contact counsel could have resulted in his speaking to counsel and subsequently deciding not to provide a statement. Police officers, in order to further advance investigations, often walk a fine line in attempting to elicit as much incriminating information as possible before an individual chooses to invoke his or her right to silence or contact legal counsel, without breaching the individual's *Charter* rights or without crossing the voluntariness line. I find, however, that in these circumstances Cst. Smith was not required to provide Mr. Wheeler an opportunity to contact counsel prior to interviewing him.

[31] In considering whether there was a s. 10(b) *Charter* breach, the whole of the circumstances need to be considered. Prior to being interviewed, Mr. Wheeler was provided the police warning and was made aware of the fact that anything he said could be used against him. He was not provided the secondary warning which, based upon the fact that he had spoken to RCMP officers on May 10, 2008, he likely should have been given. That is not necessarily fatal to the statement he provided on May 17th, and I am satisfied that the warning Mr. Wheeler was provided on that date was sufficient in the circumstances. Mr. Wheeler never asked to speak to counsel and never expressed any concern that

maybe he should. He was not, as I stated earlier, detained and was free to leave as he wished. I find that there was no s. 10(b) *Charter* breach.

Conclusion

[32] I find that statement provided by Mr. Wheeler to Cst. Smith was a voluntary statement and was made in compliance with his s. 10(b) *Charter* rights.

COZENS T.C.J.