Citation: *R.* v. *Wood*, 2007 YKTC 91

Date: 20071207
Docket: T.C. 07-00016
Registry: Whitehorse

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

REGINA

v.

THOMAS ALASTAIR WOOD

Appearances:
Noel Sinclair — Counsel for Crown
Robert Dick — Counsel for Defence

REASONS FOR JUDGMENT

[1] BARNETT T.C.J. (Oral): This is a drinking and driving case. Thomas Alistair Wood is facing charges that on March 30, 2007, in Whitehorse, he was operating a motor vehicle at a time when his ability to do so was impaired by alcohol and his blood alcohol level was over the so-called legal limit of .08. Crown counsel has properly abandoned the impaired charge and seeks a conviction only upon the over .08 charge. Count 1 is dismissed.

[2] Mr. Wood's vehicle was pulled over at about 10:20 p.m. only because he was speeding. He was doing 83 kilometres an hour in a 60 kilometre zone. Constable Wessell smelled alcohol, observed that Mr. Wood had some difficulty looking for his

driver's licence, and obtained an admission from Mr. Wood that he had indeed done some recent drinking. He therefore properly required that Mr. Wood submit to testing with an approved roadside screening device, and Mr. Wood failed that test. Constable Wessell then arrested Mr. Wood for impaired driving. He says he would likely not have done that without the benefit of the failed ASD test. Mr. Wood was taken to the Whitehorse detachment where, in a timely and proper manner, two breath samples were provided and analyzed. In each instance, the reading was .13 per cent.

[3] The defence in this case is deceptively simple: Mr. Wood says that the modest amount of beer that he drank that evening could not possibly have caused his blood alcohol level to have exceeded or even closely approached the so-called legal limit. Judges and lawyers know this as a "Carter defence" (*R.* v. *Carter* (1995), 19 CCC (3d) 174).

[4] Mr. Wood was, he says, working that day until about 6:30 p.m. He is an aircraft mechanic; he must not and does not drink alcohol while working. He says that when his work was finished, he and his employer, Dave Young, went to a hotel lounge where, over the course of about two and a half hours, he says he drank a pint and a glass of draft beer while he and Mr. Young discussed a somewhat urgent matter concerning the delivery and inspection of an airplane. Mr. Wood says that he is "quite cheap," and that for that and other reasons, it is his custom to restrict his drinking, as he says he did that evening.

[5] His testimony finds some support in the testimony of Ms. Hartling and Mr. Young. Mr. Wood says that he and Mr. Young left the hotel at about 9:30 p.m. and then went to

the nearby Subway for sandwiches and coffee. He drank no more alcohol and was headed home when he was stopped by Constable Wessell.

[6] Carolyn Kirkwood has expertise in these matters. She testified and says that for Mr. Wood to reach a .08 blood alcohol level, he would have to drink almost four standard bottles of beer, and that if Mr. Wood did indeed drink that evening as he testified, his blood alcohol level when he was driving must have been considerably under .08.

[7] When breath testing for alcohol is administered by a qualified technician using an approved instrument, the result is presumed to be correct unless there is evidence to the contrary. It sounds simple but it is not. Crown counsel says that the testimony of Mr. Wood, Mr. Young and Ms. Hartling cannot stand when placed against the result of the Datamaster, a scientific instrument which provides evidence that is supported by the "failed" ASD test. I should, Crown counsel submits, flatly reject the essential defence testimony. In that event, there would be no *evidence* to the contrary, and a finding of guilt would necessarily follow.

[8] Crown counsel relies upon *R*. v. *Fox*, a 2003 decision, [2003] S.J. No. 556 (QL), from the Saskatchewan Court of Appeal, *R*. v. *Doig*, [2005] A.J. No. 885 (QL), decided June 16, 2005 in the Alberta Court of Queen's Bench, and certain paragraphs from the 2005 decision of the Supreme Court of Canada in *R.* v. *Boucher* (2005), 202 CCC (3d) 34. I have considered but cannot accept Crown counsel's interpretation of the law, which is, as the Court demonstrated and again acknowledged in the *Boucher* decision, confusing. I believe that Crown counsel overlooks, firstly, the June 16, 2005 decision of

the Supreme Court of Canada in *R.* v. *Elias* and *R.* v. *Orbanski* (2005), 196 CCC (3d) 481, especially at paragraph 58 of that decision, at page 505. The ASD test and Mr. Wood's roadside admissions cannot be used as direct evidence to incriminate Mr. Wood. The decisions in *R*. v. *Fox* and *R.* v. *Doig* cannot now be followed on this point.

[9] Secondly, paragraphs 43 and 64 in the *R.* v. *Boucher* decision: I am quoting from paragraph 43:

> Breathalyzer results cannot be used to assess the credibility of a witness.

[10] In other words, I cannot rely, as a ground for rejecting Mr. Wood's testimony that he had drunk only two beers, on the fact that the breathalyzer result would indicate that he had drunk much more than that, and there, I am quoting with slight changes, the words of Madam Justice Charron. When I consider all the remaining relevant evidence and testimony, I cannot say that I am convinced by Mr. Wood's testimony; far from it, but Mr. Wood does not bear the burden of proving his innocence. He is required only to raise a reasonable doubt, and I find that he has done that. Count 2 is dismissed.

[11] I want to say a little more. First, when the *Boucher* case was decided, the very learned justices of the Supreme Court of Canada attempted once again to clarify areas of the law which had bedevilled and confused lawyers and judges across Canada. That the task was difficult is perhaps demonstrated by the fact that in the Supreme Court of Canada, the judges were not unanimous on all issues. The Ontario decisions in *R.* v. *Snider*, [2006] O.J. 879, and *R*. v. *McKenzie*, [2007] O.J. 2192, make interesting reading when one is wondering if the law has been clarified.

[12] Second, I have stripped my decision down to the essential "bare bones" so that my reasons can, I hope, be readily understood by anybody capable of reading plain language, and appealed by Crown counsel if he is so instructed.

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BARNETT T.C.J.