

SUPREME COURT OF YUKON

Citation: R. v. Buyck, 2009 YKSC 24

Date: 20090324
S.C. No. 05-1514A
Registry: Whitehorse
Heard in Mayo

Between:

HER MAJESTY THE QUEEN

And

ROY KENNETH BUYCK

Before: Mr. Justice C.S. Brooker

Appearances:

Noel Sinclair
Jennifer Cunningham

Counsel for the Crown
Counsel for the accused

REASONS FOR JUDGMENT

INTRODUCTION

[1] On January 29, 2009, Mr. Buyck (hereinafter referred to as the “accused”) stood trial in Mayo on a four count indictment arising out of an encounter between him and Constable Rollie Smith, a member of the Royal Canadian Mounted Police (hereinafter referred to as “Cst. Smith”) on the night of December 10, 2005. Count #1 alleged that the accused had assaulted Cst. Smith while Cst. Smith was engaged in the execution of his duty. Count #2 alleged that the accused unlawfully resisted arrest by Cst. Smith.

Count #3 alleged that the accused assaulted Cst. Smith with a weapon to wit a shovel.

Count #4 alleged that the accused escaped lawful custody.

[2] At trial, the Crown called two witnesses: Cst. Smith and Mike Sheppard. The defence called only the accused as its witness.

[3] At the conclusion of the evidence and argument, I reserved my decision.

THE EVIDENCE

[4] Exhibit 3 entered at trial was videotape. This videotape came from a camera mounted in Cst. Smith's patrol car. Unfortunately, it was not pointed at the area where the altercation between Cst. Smith and the accused took place and therefore does not actually show that part of the incident. However, Cst. Smith was wearing a portable microphone connected wirelessly with the camera and thus the audio portion of the incident is recorded.

[5] The versions of the incident given by Cst. Smith and the accused are very different. Therefore, I propose to review their evidence in some detail.

[6] Cst. Smith testified that on the night of December 10, 2005, he was alone on duty engaged in check-stops. He was on Congdon St. just north of 2nd Ave. when he observed a vehicle "cut the corner" from 1st Ave. to go onto Congdon St. He activated his blue and red flashing lights and the vehicle, proceeding northbound, stopped roughly beside the police constable's vehicle. Cst. Smith exited his police vehicle and approached the accused's Dodge Dakota truck. He went to the driver's window and the accused rolled it down. The constable immediately noticed the strong smell of burned marijuana smoke. He said he told the accused he was investigating for impaired driving.

The constable asked the accused if he had any marijuana in or on him and the accused replied no. The constable then asked for an explanation for the smell of marijuana smoke and the accused offered that he had been at Fred Elder's home where marijuana was being smoked and the smoke was blown on him. The constable then walked around the Dodge Dakota at which time when he got to the passenger side he observed a marijuana cigarette — "a roach" — in the ashtray. At that time he thought that there were two possible offences which the accused may have committed. Firstly, he thought there was some grounds for impaired driving, having regard to his observations of the accused cutting the corner, as well as the odour and appearance. On the second ground, a possible arrest was because the accused was in possession of a controlled substance ie. marijuana.

[7] At that time the constable noticed that the light on his microphone was not on so he went back to the police car and turned on the recording system. The recording system consisted of a camera mounted at the front inside of the police car as well as a wireless microphone which the constable was wearing. The constable testified that he then went back to the accused's vehicle and asked again about the odour of marijuana. The constable asked the accused to get out of the vehicle and told him that he was going to arrest him. The accused asked him why he was hassling him. Initially the accused's demeanour was cooperative. The constable testified that he advised the accused he was arresting him because of the marijuana and he would be placing him in the back of the police motor vehicle and then searching his vehicle.

[8] The accused got out of his truck. He stood beside the box of his truck. The constable was standing by the door pillar. They were facing each other. The accused started to become agitated, asking why he was being hassled. The accused had originally put his hands out in front of him as requested. The constable took hold of the accused's left wrist as he intended to hand-cuff the accused with his hands behind his back. The accused made a fist. The constable said several times "You're under arrest". The accused broke free and grabbed a shovel from the back of the truck. The constable took out his pepper spray. The accused swung the shovel at him and the constable shot him with the pepper spray. The constable testified he ran towards the accused and gave him a shove. The accused went down and his shoe came off as well as his glasses. The accused got back on his feet and threw off his jacket and grabbed the shovel holding it like a baseball bat yelling "Debbie". The constable testified he yelled "Back off sir" a number of times as he backed up towards the rear of the Suburban. However, the accused did not stop and therefore the constable unsnapped his gun holster. At that point the accused returned to his truck and put the shovel in the box. The constable moved towards him. The accused again grabbed the shovel and held it up towards him. The constable stopped. The accused put his shovel away and drove off. The constable testified that about the same time as the accused was coming through with his swing was when he began to shoot the pepper spray.

[9] The constable testified that he drove to the detachment. Later, at about 1:10 in the morning of the next day, Mike Shepherd arrived at the detachment with the accused whereupon the accused turned himself in.

[10] It is interesting to note that Mike Shepherd lives with the accused's sister Debbie and that these events took place directly across from Mike and Debbie's home on Congdon St.

[11] It would appear from the constable's evidence in chief that the accused swung at him twice. The first swing was forceful and the constable testified that had he not backed up it would have connected with his head. The second swing took place after the accused had been knocked off his feet by the constable. As the accused picked the shovel up he swung around but at that point in time, the constable was at least 8 feet away from him and there is no way that the shovel could have connected with him.

[12] On cross-examination, the constable testified that the accused was not exceeding the speed limit, his papers were in order, he did not appear drowsy, his eyes were open. He confirmed that he had never met the accused before this incident and knew nothing of him. He testified the entire incident lasted approximately 30 seconds. He testified the accused was bringing the shovel up when he pepper sprayed him the first time. The constable testified he wanted to do a search of the accused incident to the arrest because he thought he might have marijuana on him. His intention was to search the area where the accused was sitting in the vehicle but he knew that to do a full search of the motor vehicle he would need a search warrant.

[13] The constable was cross-examined specifically on evidence he gave at the first trial of this matter. Counsel for the defence tried to show an inconsistency between the evidence at trial with respect to the reasons for the arrest and the evidence on the previous trial. I have examined the portions of the previous evidence referred to by

counsel and, looking at the matter and all of the evidence before me, I am not persuaded that there is any significant contradiction such that it adversely impacts on the credibility of the constable.

[14] The audio-video tape that was made of these events once the constable had turned the mechanism on after initially stopping the accused was entered as Exhibit 3. While the video portion does not provide assistance since these events took place outside of the camera angle, the audio portion is clear and is of assistance to the court.

[15] The accused, Roy Buyck testified in his own defence. He testified that on the evening in question he was at "Fred's place" doing diamond willow carving. He believed pot was being smoked there but not by him. He testified that in the ashtray of his truck there was a "rollie" which had belonged to Fred and that Fred had left it there when he had been given a ride earlier that day. He testified that he might have cut the corner and that he saw the constable's vehicle and lights and so stopped beside it. He thought it was a seat belt check. He testified that the constable asked for his license and said that he smelled marijuana. The constable asked the accused if he was smoking pot and the accused denied it. The constable looked around the accused's vehicle with his flashlight and then said that there was a roach in the accused's ashtray. The accused testified he held the cigarette up to the constable's face and said "no it's not it's a rollie".

[16] After the constable went back to his vehicle to turn on the recording system he returned to the accused and asked him to get out of the truck and said that he was placing him under arrest. The accused testified that the constable grabbed his hand and twisted it trying to put his arm behind him. The accused got loose and yelled for

Debbie. Then, he said, the constable “maced me”. So he grabbed his shovel out of the back of his truck and put it up in front of his face to protect him from the spray. He says the constable sprayed him about 3 times. He testified that the shovel was being held horizontally in front of him. He said he had the shovel in his hand about 2 minutes. He denies ever having tried to strike the constable with the shovel. He testified that the officer “pile-driven” him and that when he got flipped over in the process his right shoe, glasses, hat and jacket came off. He denies deliberately having removed his jacket. He testified that he saw the constable’s hand go towards his gun and thought that he was going to shoot him so he left. He denies being angry. He says he was scared.

[17] The accused’s evidence on cross-examination was that he felt generally that the police were harassing him. However he said nothing was bothering him when the constable stopped him on the night in question. He admitted that the constable told him to get out of the vehicle, that he was being placed under arrest. He also said that the officer told him that he had to handcuff him for officer’s safety. He testified that as they were moving towards the RCMP vehicle, the constable yanked his arm behind his back which caused the accused to turn around and get out of the hold. He says he wasn’t trying to fight and stated “what are you doing” and called for Debbie. He says he turned back to face the constable and the constable pepper sprayed him with mace and that his glasses stopped it a bit. He then saw his shovel in the back of his truck and grabbed it and held it up in front of him to stop the spraying. He says he was scared. He denies every having swung the shovel at the constable. He admits he does not have a perfect memory of what happened. He testified that subsequently he doesn’t feel bad about

anything that happened that night. On re-examination he testified that he did not cooperate with the handcuffing because he was afraid. He did not know if he was going to get beat up.

[18] The Crown called Mike Shepherd to testify on its behalf. Mr. Shepherd at the time lived common law with Debbie, the accused's sister. He testified that on the day in question he was in bed. He heard a ruckus outside on the street. He looked out the living room window and saw 2 motor vehicles, the RCMP Suburban and the accused's vehicle. He saw a scuffle. He saw the accused jump in his truck and take off. He testified that when he first came to the window both men were outside the vehicles facing one another about 10 to 15 feet apart. He testified that Constable Smith had the accused's hand behind his back and he saw Roy squirm out of that hold, jump in his truck and take off. He heard the accused call his sister's name a couple of times. He testified that the accused had a shovel and he had it in front of him. He gave no evidence as to how it was held. He observed this from a distance of 30, 40 or 50 yards away. There are no street lights but he had no difficulty seeing what was going on. He testified that later that night, the accused called him and told him there had been a scuffle and that he thought it best if he turned himself in.

[19] In examination-in-chief, Mr. Shepherd testified that the accused did not discuss the incident with him then or since. Crown made an application, which I granted, permitting it to cross examine the accused on a previous inconsistent statement pursuant to section 9(2) of the *Canada Evidence Act*. Thereafter the Crown confronted Mr. Shepherd with his evidence from the previous trial where Shepherd was asked "and

have you talked with Roy about this lately? Answer: yes, he is a member of the family we speak often.”

[20] When confronted with this evidence the witness accepted and adopted it.

[21] On cross-examination, Mr. Shepherd testified that he saw Cst. Smith attempt to handcuff the accused and that he watched the entire proceedings until the accused drove away. He could see as much as the police vehicle would allow. I note that from the diagram, Exhibit 1, it would appear that the police vehicle was between the accused and police officer and Mr. Shepherd’s house. He cannot remember if he could see the constable all the time but he testified he never saw the accused swing the shovel at Cst. Smith. Further he testified that if the accused had swung the shovel he would have been able to see it. He says this because the accused was in view all the time. He says he is confident that he would have seen the accused swing a shovel if that had happened.

[22] When pressed as to his view and what he could see and what actually had happened, Mr. Shepherd testified he was trying to rationalize some of what had happened and that there were times when he could not see the constable.

[23] Significantly, in describing what he had seen that night, Mr. Sheppard did not mention seeing Cst. Smith pepper spray the accused nor did he mention Cst. Smith knocking the accused to the ground.

POSITIONS OF THE PARTIES

[24] The position of the defence is that Cst. Smith was not lawfully engaged in the execution of his duties in arresting the accused and therefore counts 1, 2 and 4 must be

dismissed. Counsel for the defence argued that the arrest was not lawful because there was no basis for arresting the accused for impaired driving as there were no objective signs of impairment. Further, there could be no lawful arrest for simple possession of marihuana. The defence refers me to *R. v. Storrey*, [1990] 1 S.C.R. 241, *R. v. Lockrem*, [2004] Y.J. No.28 (Yukon Territorial Court), *R. v. Janvier*, [2007] S.J. No. 646, *R. v. Polashek*, [1999] O.J. No. 968 and *R. v. Huebschwerlen*, [1997] Y.J. No. 24 (Yukon Territorial Court).

[25] As to count 3, the defence argues that the evidence of Mr. Sheppard confirms the accused's version that he did not swing the shovel at Cst. Smith. Rather, he simply held it up to protect himself from the pepper spray. In other words, he was acting in self-defence. The defence concedes that the accused would not be justified in swinging the shovel at Cst. Smith. At the very least, the defence argues that there is reasonable doubt on count 3.

[26] The Crown's position is that the evidence proves that the accused is guilty on all four counts but that convictions should only be entered on counts 3 and 4 and the remaining two counts "Kiennapped".

[27] The Crown submitted that Cst. Smith had reasonable grounds to arrest the accused in order to investigate for impairment and that the arrest was a necessary part of that investigation. Consequently, Cst. Smith was lawfully engaged in the execution of his duties. It cites *R. v. Webster*, [2008] B.C.J No. 2234 (B.C.C.A.) in support of its position. Further, the Crown says that there was clearly an arrest made and thus there is no need for the court to consider the doctrine of investigative detention.

[28] The Crown argued that Mr. Sheppard is biased in favour of the defence and that the accused's evidence is unreliable and in conflict with the audio on Exhibit 3.

[29] Finally, the Crown argued that even if there were not grounds for the arrest here, the accused is still guilty of assault with a weapon.

[30] From the evidence and concessions made during argument, a number of things are clear and beyond dispute. First, the accused was arrested by Cst. Smith. Second, the accused broke free and escaped from Cst. Smith's custody. Third, the accused took a shovel from the back of his truck and used it in some fashion. How he used it is very much in dispute.

ISSUES

[31] Having regard to the above findings, the issues left to be determined are these:

(1) was the arrest of the accused by Cst. Smith lawful? (2) Did the accused assault Cst. Smith with the shovel?

ANALYSIS

(1) Was the arrest of the accused by Cst. Smith lawful?

[32] Section 495(1) of the *Criminal Code* permits a peace officer to arrest a person without warrant in specified circumstances. Section 495(2) sets out limitations to this power of arrest. Of note is the exception in subsection (d)(ii).

[33] In *R. v. Storrey*, [1990] 1 S.C.R. 241, the court, dealing with the case of arrest without warrant, noted at para. 17:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and

probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there was indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.

[34] As noted by the Ontario Court of Appeal in *Polashek*, the test for assessing reasonable grounds for arrest are not as exacting as they might be in other situations where the court assesses reasonable grounds. There, the court, at para.19 adopted the reasoning of Doherty, J.A. in a previous case where he said, in part:

... In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different from those which operate on an application for a search warrant. Often the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. ...

[35] Here, Cst. Smith, working alone and late at night, observed the accused driving in an unusual fashion, ie. cutting the corner. When stopped, there was a strong smell of burned marihuana emanating from the vehicle. Upon further observation, Cst. Smith observed what he thought was a roach in the ashtray. At that point he decided to arrest the accused for possession of marihuana and possible impaired driving due to a drug. I pause to note at this point defence counsel's forceful argument that none of the usual signs of impairment were observed eg. slurred speech, blood shot eyes etc. However, the suspected impairment here was not due to alcohol but rather by drug. There is no

suggestion that the usual signs of alcohol impairment are also those of drug impairment. Here, there was one aspect of the driving which was out of the ordinary, plus the smell of burned marihuana plus the apparent presence of a partly smoked roach.

[36] I have noted the cases referred to me by the defence. It is clear that there are conflicting cases on whether simply smelling burned marihuana alone constitutes reasonable objective grounds for arrest. However, I prefer the reasoning of the British Columbia Court of Appeal in *Webster*, which, while made in the context of investigative detention, I find applicable to the arrest in the circumstances of the case before me. At para. 31, the court observed:

In my view, the odour of freshly-smoked marihuana emanating from a vehicle objectively supports, at a minimum, a reasonable suspicion that the driver and/or passenger are then engaged in criminal activity, namely possession of marihuana. It is reasonable to suspect that persons who have just used marihuana will have more of that drug in their possession. In addition, when the odour of freshly-smoked marihuana is emanating from a vehicle, it is reasonable to suspect that the driver's ability to operate that vehicle is impaired by a drug, an offence contrary to s.253(10(a) of the ***Criminal Code***, R.S.C. 1985, c. C-46. In light of this, Mr. Webster was lawfully detained for investigation.

[37] Here, not only did Cst. Smith have the strong smell of freshly-smoked marihuana, he also had his observation of what he said was a partially smoked "roach" in the ashtray, the rather lame explanation from the accused that the smoke came from others smoking marihuana, not him, plus the evidence of the accused's cutting the corner while driving. All of this evidence, in my opinion satisfies the above-mentioned

test for arresting the accused in these circumstances. I therefore find that the arrest was lawful.

(2) Did the Accused Assault Cst. Smith With the Shovel?

[38] This entire incident happened very quickly — maybe thirty seconds, according to Cst. Smith. It also happened a long time ago — almost 3 ½ years ago. Memories are likely to fade.

[39] It is regrettable that Cst. Smith failed to either focus the camera in his police car to where he and the accused were standing, or to conduct his discussions with the accused in front of the police car where the camera was pointing, instead of beside it. If he had done so, this incident would have been recorded on video. In the absence of that, we must rely on the memories of the direct participants, the witness Sheppard, and the audio recording.

[40] The evidence is clear that Cst. Smith pepper sprayed the accused. The evidence is also clear that the accused took a shovel from the back of his truck after he broke free from Cst. Smith and held the shovel in front of him, he says, to protect himself from the pepper spray.

[41] Cst. Smith says that the accused swung the shovel at him twice. The accused denies swinging the shovel at the constable.

[42] In other words, the essence of the accused's position is that he grabbed the shovel to use it to defend himself from Cst. Smith's attacking him with pepper spray. The essence of the constable's position is that he used the pepper spray to defend himself from the accused's attacking him with the shovel.

[43] Mike Sheppard testified that he saw the situation from the time Cst. Smith tried to handcuff the accused until the accused drove off and that although he saw the accused holding the shovel in front of him, he never saw it being swung at Cst. Smith and that if the accused had swung it at Cst. Smith, he would have seen that.

Interestingly, Sheppard, a friend of the accused, was called as a Crown witness, not a defence witness.

[44] The evidence from the audio tape, Exhibit 3, is very helpful in resolving the contradictory evidence and positions. It clearly shows a number of things. First, one can hear the anger in the accused's voice upon being arrested. Second, one can hear Cst. Smith calmly and politely advising the accused that he was being arrested, and why he was going to be placed in handcuffs. Thereafter, as the incident unfolds one can clearly hear Cst. Smith commanding the accused on a number of occasions to "stand back" and "back off". These commands are consistent with the constable's version of the events and inconsistent with that of the accused's. Third, one can clearly hear Cst. Smith, still under the effects of the incident and the pepper spray which got in his eyes, telling the other RCMP officer who met him at the police station, what had happened. Cst. Smith's explanation, made within less than five minutes (as I measure the time from Exhibit 3) of the start of the scuffle, is consistent with Cst. Smith's description of the incident before me.

[45] In the result, I have concluded that Cst. Smith was an honest and credible witness before me and I accept his evidence.

[46] However, that is not the end of the matter. The accused testified in this trial. I have therefore instructed myself in accordance with the Supreme Court of Canada decision in *R. v. W.(D.)*, (1991), 118 C.C.C.(3d) 1. As well, Sheppard's evidence supports the accused's position and I therefore ask myself whether I have a reasonable doubt. I have instructed myself on the meaning of reasonable doubt as set out by the Supreme Court of Canada in *R. v. Lifchus* (1997), 118 C.C.C.(3d) 1 and *R. v. Starr*, [2000] 2 S.C.R. 144.

[47] I have thoroughly considered the accused's evidence. I do not find him credible. He admits that he does not have a perfect memory of what happened that night. He could not, having regard to the audio tape, Exhibit 3, have had the shovel in his hands for about 2 minutes as he said. It does not seem plausible that he would be at Fred's place that evening where pot was being smoked and for him not to have smoked some pot. His description for how he came to lose his coat in the scuffle does not make sense. His evidence that he was scared and did not co-operate with being handcuffed because he was scared and that he did not know if he was going to be beaten up then seems preposterous when one listens to Exhibit 3 and hears his voice. In the result, I simply do not believe the accused when he says he did not swing the shovel at Cst. Smith.

[48] I have carefully reviewed the evidence of Mike Sheppard. Either he is mistaken and simply did not see the accused swing the shovel at the constable or he has perjured himself. His overall credibility is suspect having regard to his statement at trial initially that the accused had not discussed the incident with him at the time or since.

Yet, he testified at the earlier trial that he had spoken to the accused about the incident and that he is a member of the family and they speak often. Moreover, Sheppard admitted that he was trying to rationalize some of what happened. Finally, Sheppard's failure to see or mention seeing Cst. Smith pepper spraying or knocking the accused to the ground cast doubt on whether he saw the entire event or his ability to accurately and fully recount it. All in all, I do not find Mike Sheppard to be a credible witness.

[49] Applying the law as set out in *W.(D.), Liftchus and Starr*, I conclude as follows: I do not believe the accused when he says he did not swing the shovel at Cst. Smith. Neither his evidence nor that of Mike Sheppard raise a reasonable doubt in my mind as to whether or not the accused swung the shovel at Cst. Smith. I reject Sheppard's evidence that suggests that the accused did not swing the shovel at Cst. Smith. I accept the evidence of Cst. Smith that the accused did swing the shovel at him on two occasions. On the basis of Cst. Smith's evidence and the audio tape, I am satisfied beyond a reasonable doubt that the accused swung the shovel at Cst. Smith as the constable was engaged in the execution of his duties.

CONCLUSION

[50] In the result, I find the accused guilty on all 4 counts of the indictment. However, as sought by the Crown, convictions will only be entered on Counts 3 and 4. Counts 1 and 2 will be stayed on the Kiennapple principle.

[51] A date should now be set for sentencing on these two convictions. If counsel are seeking a pre-sentence report, I order it and the sentencing date should be set to a date that gives sufficient time for the court and counsel to receive and consider it. I

presume the Crown will have no objection to the accused remaining at liberty on the same terms and conditions as presently exist until sentencing and I so order. If, however, the Crown has some objection, counsel may speak to that issue at a date, time and place to be determined now.

BROOKER J.