SUPREME COURT OF YUKON

Citation: *R v Driedger,* 2016 YKSC 14

Date: 20160229
S.C. No. 15-AP014
Registry: Whitehorse

Between:

REGINA

Respondent

And

ABRAM DRIEDGER

Appellant

Before Mr. Justice R.S. Veale

Appearances:

André Roothman — Counsel for the Appellant
Christiana Lavidas — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Driedger appeals the conviction of a Territorial Court Judge for transporting an unsecured handgun, contrary to s. 86(2) of the *Criminal Code*, RSC 1985, c. C-46, and possessing a restricted firearm at a place other than where he was entitled to possess it, contrary to s. 93(c) of the *Criminal Code.*

[2] Counsel agree that the search was unlawful. The trial judge admitted the evidence, a handgun, pursuant to s. 24(2) of the *Charter* and made findings of guilt. The evidence of the handgun formed the basis of the conviction.

[3] This appeal focuses on the trial judge's finding that Mr. Driedger consented to the search and the admission of the handgun under s. 24(2) of the *Charter*. In his reasons, the trial judge considered Mr. Driedger's consent in the context of his s. 24(2) analysis rather than as part of the consideration of whether s. 8 was breached.

[4] I reject the submission of the Respondent that the trial judge's reasons were not sufficient to allow for meaningful appellate review.

THE FACTS

[5] Mr. Driedger was driving on the Alaska Highway near Teslin, Yukon, when he was stopped at a roadside check on September 12, 2014. The check was set up to look for, among other things, contraventions of the *Wildlife Act*, R.S.Y. 2002, c. 229, as amended.

[6] After pulling over Mr. Driedger's vehicle, the Conservation Officer ("C.O.") involved in the check stop asked Mr. Driedger if he had any firearms. Mr. Driedger responded that he had firearms in his trailer that he was pulling.

[7] The C.O. observed what he believed to be a gun case behind the driver's seat. He asked Mr. Driedger to unlock the back door and he then took the gun case out of the vehicle. He opened the gun case and found the handgun, a restricted weapon, as well as an unloaded magazine and two loaded magazines. The C.O. assumed that he had authority to inspect the vehicle under the *Wildlife Act*.

[8] The incident took five minutes and Mr. Driedger remained in his seat.

THE TRIAL JUDGE'S DECISION

[9] The trial judge held a *voir dire* to determine whether the search of the vehicle was a breach of s. 8 of the *Charter,* which states that everyone has the right to be secure against unreasonable search or seizure.

[10] The trial judge noted that the C.O. did not rely on s. 136(2) of the *Wildlife Act*, which permits the C.O. to request the operator of a vehicle to produce a firearm for inspection because he thought his reasonable grounds to believe there was a firearm in the vehicle gave him the right to search under the *Act*.

[11] The trial judge ruled the seizure unlawful and relied on *R. v. Dhillon*, 2012 BCCA 254, at para. 76, to justify the impugned conduct under s. 24(2) of the *Charter* on the basis that Mr. Driedger consented to the search. He described the consent as follows at para. 8:

> Now I will refer back to the particular facts of this case. The officer, as I said, did not ask Mr. Driedger to produce a firearm. He could have said, "Please produce that thing", the "thing" being the case. He is authorized to ask someone to produce "things" and could have said "I want to determine whether there is a firearm inside of it." Instead, for what he says are officer safety reasons, he told Mr. Driedger: "I want to inspect that case in the back to verify whether it is a firearm and I want you to unlock the door so I can do that." Mr. Driedger complied and unlocked the door. It could have gone down several different tracks, but the fact that Mr. Driedger did unlock the door is consent for the officer to do only what he said he wanted to do, and that is not search the vehicle, but look inside the case. The consent for that action of the officer was given by Mr. Driedger, and that therefore mitigates the seriousness of the breach to a considerable extent, and to the extent that, in my view, s. 24(2) should not be utilized to exclude the evidence.

[12] The trial judge fined Mr. Driedger in the amount of $200 plus a 30% victim fine surcharge on each count.

THE ISSUES

[13] The following issues will be addressed:

1. What is the standard of review?
2. Did Mr. Driedger consent to the search of his vehicle and gun case?
3. Should the handgun be admitted into evidence under s. 24(2) of the *Charter*?

The standard of review

[14] The standard of review for an appeal on a question of law is one of correctness. The standard of review for an appeal on a matter of fact is whether the trial judge is shown to have made a palpable and overriding error.

[15] Where the matter is one of mixed fact and law, the standard of review depends on whether the error in law can be separated from the facts. Where it cannot be, the interpretation of the evidence will not be overturned absent palpable and overriding error (*R. v. Tiffin,* 2008 ONCA 306).

Did Mr. Driedger consent to the search of his vehicle and gun case?

[16] The factual finding of the trial judge that Mr. Driedger consented to his search is an inference drawn from the evidence as there was no use of the word “consent” by either Mr. Driedger or the C.O. The trial judge found the fact that Mr. Driedger unlocked the door of his vehicle was consent for the C.O. “to inspect that case in the back to verify whether it is a firearm”. In examination in chief, the C.O. stated:

> I asked him to make sure that the back door was unlocked so that I could open the rear door and verify whether or not it was a firearm.

[17] And in cross-examination he stated:

Q Okay. Now, let's just backtrack slightly. You testified that you did not ask permission to open the door, you just asked Mr. Driedger to open the door?
A I asked that the back door be unlocked. I did not ask their permission.
Q You – you instructed him to unlock the back door?
A Correct. I asked him to please open the door –
Q Okay.
A -- please unlock the door.
Q Okay.
A So it was an instruction or a question, but either way.
Q And did you tell him for what purpose?
A So that I can check the plastic case that I had seen.
Q Did you tell him that you want to search the vehicle?
A No.
Q Okay. You told him that you want to check the box inside the vehicle?
A Correct, I did.
Q Okay. And so at no time was your intention to seek permission from Mr. Driedger to enter the vehicle and to retrieve the box or the case with the gun or what you expect – later found to be a gun?
A Sorry, can you repeat your question?
Q At no time did you seek permission from Mr. Driedger to enter the vehicle –
A No.
Q -- and to retrieve the – case or the container?
A No, I did not ask permission to open the door.

[18] The evidence is that after the verbal exchange, the C.O. simply opened the door and removed and opened the case, finding the handgun. No further words were spoken by Mr. Driedger to express his consent. Given that the accused did not expressly consent to the search, the question is whether the trial judge properly applied the legal test for consent confirmed in *Dhillon*, at para. 29, which requires that:

> (i) the individual must be advised of his right to refuse or withdraw his consent at any time;
>
> (ii) the individual must be made aware of the consequences of his consent to the search; and

> (iii) the individual must be informed of his right to counsel in order to have explained to him the consequences of his consent to the search.

[19] In my view, none of the three legal tests was met in this case and the trial judge gave no indication that he was even applying the consent test from *Dhillon*. To the extent that this is a question of mixed fact and law, I conclude that, even applying the more deferential palpable and overriding error standard of review, the trial judge erred in finding that Mr. Driedger consented to the unlawful search.

[20] In the absence of a valid consent, both counsel agree with the trial judge's finding that the warrantless search conducted by the C.O. was unlawful. His determination that there was no legislative basis on which the C.O. could have conducted a warrantless search was not appealed.

Should the handgun be admitted under s. 24(2) of the *Charter*?

[21] Section 24(2) of the *Charter of Rights and Freedoms* states:

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[22] In *R v Grant*, 2009 SCC 32, the Supreme Court of Canada set out the three factors that must be taken into consideration and balanced:

> (1) the seriousness of the *Charter*-infringing state conduct,
>
> (2) the impact of the breach on the *Charter*-protected interests of the accused, and
>
> (3) society's interest in the adjudication of the case on its merits.

[23] This Court has recently applied s. 24(2) in the case of *R v Gaber*, 2015 YKSC 38, which sets out the three factors in the context of the unlawful search of a corrections officer in the workplace.

(i) The seriousness of the *Charter*-infringing state conduct

[24] The more severe or deliberate the state conduct, the greater the need for the court to dissociate from the conduct by excluding the evidence. While an inadvertent or minor violation reduces the need for exclusion, a wilful or reckless disregard of *Charter* rights will have a negative effect on public confidence in the rule of law.

[25] The conduct of the C.O. in this case reflects a minor violation of Mr. Driedger's *Charter* rights. The trial judge accepted, and I agree, that the C.O. could have asked that the firearms case in issue be produced for inspection and that Mr. Driedger would have had to comply under s. 136(2) of the *Act*.

[26] As well, although both counsel took the position before me that the search was unlawful, neither the trial judge nor I heard submissions about the scope of the warrantless search power under s. 142 of the *Wildlife Act*. Although the C.O. did not refer to this section in his evidence at trial, it would seem to me that this provision is one a C.O. could rely on to conduct a warrantless search of a vehicle in appropriate circumstances. The availability of this warrantless search power under the *Act* also tends to indicate that the violation was on the less serious end of the spectrum.

(ii) The impact of the breach on the *Charter*-protected interests of the accused

[27] This factor considers whether the breach was serious and undermined the protection of s. 8 or whether the breach was more fleeting and technical.

[28] While a vehicle owner has a reasonable expectation of privacy in his or her car, the search of Mr. Driedger's vehicle did not extend beyond the C.O. entering the car to retrieve the firearms case. On the evidence before me, there was no search of other areas of the vehicle's cabin and no entry into the trunk. Ultimately, the C.O.'s search amounted to him removing an item that was in plain sight and the very item he could have required production of under s. 136. There was no significant intrusion on Mr. Driedger's privacy.

(iii) Society's interest in the adjudication of the case on its merits

[29] This factor requires the consideration of whether the truth seeking function of a criminal trial is better served by admitting versus excluding the evidence.

[30] The firearm obtained as a result of the search is reliable evidence and its admission would tend to enhance the truth-seeking function of the trial.

CONCLUSION

[31] In my view, each of the three factors lend themselves to the admission of the evidence in this case. The state conduct was inadvertent and minor. The search was not intrusive and had a relatively minimal impact on the privacy rights of Mr. Driedger. The gun is reliable evidence.

[32] Although the trial judge erred in finding that Mr. Driedger consented to the search of his vehicle, I would not come to a different conclusion about the admission of the handgun as evidence under 24(2). I therefore sustain the convictions.

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VEALE J.