Citation: *R.* v. *Couch,* 2011 YKTC 32

Date: 20110624
Docket: 10-00734
10-00734A
Registry: Whitehorse

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

REGINA

v.

DAKOTA LANCE COUCH

Appearances:
Judy Bielefeld — Counsel for the Crown
Kim Hawkins — Counsel for the Defence

RULING ON VOIR DIRE

[1] Dakota Couch has been charged with having committed an assault against his common law partner, Tiarra Butler.

[2] At the commencement of the trial, a *voir dire* was held to determine the admissibility of an audio- and videotaped statement made by Mr. Couch to RCMP Cst. Dixon. Crown counsel indicated that the intent was to have the statement admissible for the purposes of cross-examining Mr. Couch, should he choose to testify.

[3] The issue on the *voir dire* was whether the statement was voluntarily made. There were no *Charter* issues raised.

[4] The trial was adjourned pending the outcome of this decision.

Evidence

Cst. Dixon

[5] Cst. Dixon testified that on January 8, 2011 he was on duty in the bullpen area of the Whitehorse RCMP Detachment. Ms. Butler and her mother appeared at the front counter to report a fight that had occurred that day between Ms. Butler and Katrina Couch. Ms. Couch is Mr. Couch's sister.

[6] In the course of receiving information from Ms. Butler, Cst. Dixon learned of an incident between Mr. Couch and Ms. Butler that had occurred on December 31, 2010. Ms. Butler alleged that Mr. Couch had assaulted her.

[7] As a result of what he learned regarding the December 31 incident, Cst. Dixon went to Mr. Couch's residence at approximately 10:25 p.m. on January 8, 2011. Mr. Couch answered the door, confirmed his identity, and was told that he was being arrested for a spousal assault. He was told to get his shoes and come with Cst. Dixon.

[8] Cst. Dixon testified that he advised Mr. Couch at the door of the residence and on the way back to the police cruiser of his right to legal counsel. He also recalls telling him that he didn't have to talk to the police unless he wished to, and that if he chose to speak to Cst. Dixon anything he said could be used as evidence in court. Cst. Dixon gave these rights from memory and testified that when doing so, it was his general

practice to keep it as simple as possible. Cst. Dixon said that Mr. Couch told him that he understood.

[9] Cst. Dixon said that Mr. Couch seemed initially confused about what was happening and appeared to think the police visit was about the fight between his sister and Ms. Butler, a matter that he was only indirectly involved in. At the door Mr. Couch asked Cst. Dixon “Why me?”. Cst. Dixon stated that, on the way to the police cruiser, he explained that the arrest was with respect to the alleged incident between him and Ms. Butler on December 31, 2010.

[10] Cst. Dixon stated that in the police cruiser he again told Mr. Couch the reason for his arrest and provided him his right to counsel from a police card. Cst. Dixon stated that Mr. Couch advised him that he understood. When asked whether he wanted to contact a lawyer, Mr. Couch indicated that he wished to speak to Legal Aid.

[11] At the RCMP Detachment, Mr. Couch was twice offered an opportunity to speak to counsel. He declined these opportunities, stating “I’ll do it another day”.

[12] Cst. Dixon stated that Mr. Couch seemed quiet and calm, was cooperative and appeared to be sober. He testified that any other conversation with Mr. Couch in the police cruiser and at the RCMP Detachment was minimal, relating only to the offering of an opportunity to contact counsel and directions to the cell and the interview room. He did not think that any other officer interacted with Mr. Couch, with the possible exception

of Cst. Seidemann, who would have asked Mr. Couch some standard questions during the booking process.

[13] Mr. Couch was initially taken to cells, where he waited alone while the interview room was prepared. This took less than 15 minutes. He was then taken to the interview room and the audio- and videotaped statement was taken from him.

[14] In cross-examination, Cst. Dixon agreed that there was no urgent reason to arrest Mr. Couch that night. He testified that he wanted to have Mr. Couch attend the RCMP Detachment in order to try to obtain a statement from him. He stated that Mr. Couch seemed surprised that he was being arrested and agreed that Mr. Couch started his statement by speaking about that evening's altercation between his sister and Ms. Butler.

[15] Cst. Dixon agreed that his notes from that evening were sparse, and consisted of about 12 lines in his notebook. However, in the seven-page case file synopsis that he prepared after Mr. Couch was arrested and released he wrote:

> Cst. Dixon informed Dakota that he would be informed of the nature of the allegations made against him following the arrest procedure.

[16] Cst. Dixon stated that this only meant that he would explain to Mr. Couch exactly what Ms. Butler had said in her statement.

[17] Cst. Dixon testified that he told Mr. Couch that he would be taken home once they "were done" at the Detachment. He agreed that "being done" could mean "once he'd provided a statement", to the extent that Mr. Couch chose to make a statement.

[18] Cst. Dixon stated that he did not read Mr. Couch the secondary police warning about his right to silence and his choice to make a statement from a card at any time. For clarity, Cst. Dixon testified that he did not read the following caution to Mr. Couch from a card:

> Anything you may have said to anyone earlier, or that anyone may have said to you, should not influence you or make you feel like you have to say anything at this time. You do not need to say anything further at this time unless you wish to. Anything you say may be used as evidence.

Mr. Couch

[19] Mr. Couch testified on the *voir dire*. He said that he had been getting ready for bed and had the lights turned out when Cst. Dixon knocked on his door. He was arrested and told to get his shoes. He asked what was going on and why he was being arrested. He states that Cst. Dixon informed him that he would be told why he was arrested once they arrived at the police station. He did not recall there being any further conversation at the door of his residence.

[20] Mr. Couch also does not recall there being any conversation in the police cruiser, other than that he repeatedly asked why he was being arrested, and he provided answers to questions from Cst. Dixon. He testified in cross-examination that he does recall Cst. Dixon reading him something from a card, but stated that he wasn't really

listening, and he was mostly worried about what was going on. He agreed that Cst. Dixon had read him his rights and specifically told him that he was entitled to a lawyer. He didn't recall being cautioned about saying anything to the police. He stated that he wasn't really sure at the time what the police warning meant, but he understood he could call a lawyer. Mr. Couch said that the ride in the police cruiser lasted less than five minutes.

[21] Mr. Couch testified that, once he arrived at the police station, he was repeatedly asked to make a statement and also again told that he could speak to a legal aid lawyer. He stated that he thought that he had a right to talk to a lawyer about what he would say in his statement, to make sure he "didn't say anything [he] shouldn't". He stated that he chose not to speak to legal aid counsel at the time as it was 10:30 at night, and he wished to deal with the matter of legal counsel in the morning.

[22] Mr. Couch said that he was told he would be taken home when he had provided a statement. He said that he understood this to mean that he would not be able to leave the Detachment until he gave a statement. If he did not make a statement, he believed he would remain in cells all night. He stated that he had never spent a night in cells before.

[23] Mr. Couch testified that, when he began to make the statement, he didn't know yet why he was at the police station.

Statement

[24] The statement was started at 10:39 p.m. and lasted until 10:55 p.m. It was audio- and video-recorded, and a transcript was made available in the voir dire.

[25] At the beginning of the statement the following exchange occurred:

> Q. …it's only been like two minutes since we picked you up at your house and you're arrested Dakota so I've just read you your rights, you stated that you understood them and you didn't want to contact counsel today. That you're gonna contact legal aid or a lawyer of your own choice down the road. You said you'd call someone another day. That's just why I left you down there a little while. I'm just gonna read you that you have a reasonable opportunity to contact a lawyer, and the police can not take a statement from you or ask you to take part in any process that might provide evidence before you've had the opportunity to contact a lawyer. You understand that?
>
> A. Yeah
>
> Q. And do you want to use a telephone to contact a legal aid lawyer or any other lawyer?
>
> A. Well would they be able to find out what I'm being, like what the story is?
>
> Q. Oh we'll…
>
> A. INAUDIBLE
>
> Q. tell you why you're here.
>
> A. Did she say that it was because today what my sister did…
>
> Q. You're you're wondering whether a lawyer's able to tell you more about the…
>
> A. what happened between her and my sister or?
>
> Q. No well that's why she initially came in.
>
> A. Yeah
>
> Q. But if you're wondering if a lawyer's able to tell you more about that they don't have any more information no.

A. Okay

Q. You and I will cover that. I'm just making sure that you don't, you do or you don't…

A. Yeah

Q. want to talk to a lawyer before you and I have a chat that's all.

A. Okay

Q. So do you wanna talk..

A. No I don't think so.

Q. Okay. Okay so, I guess the easiest way to start this, you weren't surprised to see me show up at the door, cause there's obviously something going on at the house tonight, why don't you tell me why you think, you're here and what's going on?

[26] Mr. Couch then provided detailed information about the confrontation between his sister and Ms. Butler earlier that evening.

[27] Following this, Mr. Couch was advised by Cst. Dixon that "…to be honest with you that's not really why you're here right now". Mr. Couch was told that Cst. Dixon had received information from Ms. Butler that on New Year's Eve, Mr. Couch had thrown her to the ground, tried to strangle her and slapped her around while they were in a fight.

[28] Mr. Couch proceeded to provide his version of the events of New Year's Eve.

[29] The following discussion then took place:

Q. Okay, but do you understand why you're here, you understand the issue with?

A. Yeah. That's why I need to talk to my lawyer whatnot.

> Q. Okay, you want to talk to somebody now before we keep talking or?
>
> A. Uhm.
>
> Q. We can stop and you can go call a lawyer…
>
> A. No it's okay.
>
> Q. we can come back after…
>
> A. I'm tired, just me and her were fighting earlier that's why she got into a fight with my sister because my sister came, and she was already feeling upset so my sister was like get out of my face and Tiarra was like, you're rude and my sister called her rude when she opened the door because Tiarra was like, no Tiarra called her rude and then my sister called her rude and, it was just ridicules [sic].

[30] There was no further questioning of Mr. Couch by Cst. Dixon in regard to the alleged offence.

[31] At the conclusion of the statement, Mr. Couch was released on an Undertaking with conditions and provided a ride back home.

Submissions of Counsel

[32] Defense counsel submits that Mr. Couch was not aware that he had a choice as to whether he had to make a statement or not, and, further, that he believed that he would only be able to go home after he had provided a statement.

[33] In support of her position, defense counsel points to the arrest having occurred relatively late at night, and a week after the alleged incident. On the evidence, Mr. Couch was evidently unsure why he had been arrested, and clearly thought that the police were at his home in response to the occurrence earlier that evening between his

sister and Ms. Butler. This confusion remains apparent during the interview. Defence counsel asserts that, while Mr. Couch was provided his *Charter* right to counsel in the police cruiser, he was not explicitly told that he did not have to make a statement. As well, he was unable to fully appreciate his rights, given his confusion about what was going on and why he had been arrested.

[34] I note that defence counsel is not raising an argument with respect to whether the provisions of s. 495 of the *Code* with respect to the powers of a peace officer to arrest without warrant were complied with and, as such, I will not address this issue in my reasons.

[35] Defence counsel submits that Cst. Dixon's statements to Mr. Couch at the beginning of the interview were insufficient to ensure that Mr. Couch was providing the statement voluntarily. Cst. Dixon did not advise Mr. Couch that he did not have to make a statement, only that the police could not take a statement from him until after an opportunity had been provided to Mr. Couch to contact counsel. This is consistent with the evidence of Mr. Couch that he thought that he was either going to have to give a statement or spend the night in police cells.

[36] Crown counsel submits that Cst. Dixon's statement to Mr. Couch that he would take him home after they were done was not an inducement to make a statement. Cst. Dixon did not actually state that he would take Mr. Couch home only after he had provided a statement. Crown counsel says that there is no other evidence that supports a finding that the statement was not voluntarily made.

Analysis

[37] The Crown has to prove beyond a reasonable doubt that Mr. Couch's statement was voluntarily made.

[38] In order for a statement to be voluntary, it must have been freely and voluntarily made, in the sense that the detained person must have been able to make a meaningful choice about whether or not to speak to the police (***R.*** v. ***Oickle***, [2000] 2 S.C.R. 3; ***R.*** v. ***Singh***, 2007 SCC 48). A voluntariness analysis requires a contextual approach that considers a number of factors, including, but not limited to, the presence or absence of threats or promises, oppression, an operating mind and police trickery.

[39] Nothing in the conduct of Cst. Dixon that evening in dealing with Mr. Couch causes any one of these latter considerations to leap to the forefront, so to speak.

[40] What we do have, however, is a combination of factors that, when viewed in their entirety, causes me to have a reasonable doubt about the voluntariness of the statement Mr. Couch provided.

[41] At the time of his arrest, Mr. Couch was 18 years old and had limited experience with the RCMP. He was clearly confused with respect to the incident that Cst. Dixon wanted to speak to him about. This confusion was understandable, given the incident between his sister and Ms. Butler that had occurred earlier that evening.

[42] Mr. Couch, although offered the opportunity to speak to a lawyer before providing a statement, was evidently unsure about what assistance he would receive from a lawyer. Somewhat telling is the following exchange from the commencement of his statement:

> Q. And do you want to use a telephone to contact a legal aid lawyer or any other lawyer?
>
> A. Well would they be able to find out what I'm being, like what the story is?
>
> Q. Oh we'll…
>
> A. INAUDIBLE
>
> Q. tell you why you're here.

[43] While it is not a police officer's job to ensure that an accused person actually exercises all of his or her rights upon arrest, it is the police officer's job to take reasonable steps to ensure that a statement is voluntarily made and not taken in contravention of any *Charter* rights of the accused. Therefore, in certain circumstances, it may be required that a police officer take extra steps to ensure that an accused individual has a meaningful understanding of the situation he or she is in, and of the choices he or she can make. It may not be enough in certain circumstances to simply provide the information, either by memory or by reading a card, or by providing the opportunity to contact counsel.

[44] Where it is, or should be, apparent that an accused is unclear about the jeopardy he or she is in and the choices available to them, more may be required from a police officer. In such circumstances, the societal obligation upon a police officer to ensure

that the requirements of voluntariness and/or *Charter* compliance are met may not be satisfied simply by complying with standard practice. At the heart of the obligation is substantive recognition of fundamental legal rights, and this requires that the particular circumstances of the individual accused in the situation be taken into account by the police officer.

[45] It can be seen from the above exchange that Mr. Couch was wondering whether a lawyer could inform him of the reason for and details of his arrest and charges. Cst. Dixon stated that the RCMP would do this. Thus, the value of speaking to a lawyer was somewhat lessened in Mr. Couch's eyes. In this regard, Mr. Couch testified that he thought he had a right to talk to a lawyer about what he should or should not say in a statement. Certainly a lawyer could also have provided Mr. Couch advice in respect of the consequences of making or not making a statement and also clarify how to assert his right not to make one. I note the evidence is not particularly clear as to the extent to which Cst. Dixon advised Mr. Couch that he did not have to make a statement, or that anything he said could be used as evidence against him.

[46] While Cst. Dixon was not required to ensure that Mr. Couch spoke to a lawyer in order to receive legal advice regarding his options, he was required to ensure that Mr. Couch had clear information about the choice he had not to make a statement and about the use that could be made of any statement he did make.

[47] In the present case there is no evidence of an inducement being specifically offered to Mr. Couch. That said, on his evidence, Mr. Couch may well have subjectively

believed that he would only be taken home that night if he provided a statement, notwithstanding Cst. Dixon's testimony that "done" did not necessarily mean 'done taking a statement'. What Cst. Dixon intended by these words may well not have been what Mr. Couch thought they meant.

[48] The context in which the arrest occurred that evening must be looked at to see whether there is a sufficient evidentiary basis to raise a reasonable doubt as to whether the statement was voluntarily made. The evidence before me is that Cst. Dixon informed Mr. Couch initially and from memory that he did not have to make a statement, or that any statement made could be used against him, while walking from Mr. Couch's door to the police cruiser, and while it is clear that Mr. Couch did not really understand why he was being arrested. Mr. Couch has little recollection of what Cst. Dixon said to him.

[49] In order for a statement to be voluntarily made, the accused must clearly understand that he or she does not have to make a statement at all. An analogous situation is the obtaining of consent to search. For the consent to be valid the individual must also be aware that he or she has the right not to consent to the search or to withdraw the consent that was given. A valid consent is not the rubber-stamping of something that the police are going to do in any event. The fact that a search warrant will likely be obtained in the absence of consent does not make the informed nature of the consent any less of a requirement.

[50] In this context, I have a reasonable doubt about whether Mr. Couch was aware that he did not have to provide a statement to Cst. Dixon. It would have been a simple matter to have made this clear to Mr. Couch prior to taking the statement. Given Mr. Couch's evident confusion throughout the evening, more needed to be done.

[51] I also have a reasonable doubt about whether Mr. Couch was aware that that anything he said in the statement that he provided could be used as evidence against him.

[52] For all these reasons I have a reasonable doubt on whether the statement was provided voluntarily and therefore exclude it from being admissible as evidence at trial.

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COZENS C.J.T.C.