Citation: *R. v. Fred*, 2019 YKTC 34

Date: 20190130
Docket: 16-00491
Registry: Whitehorse

# IN THE TERRITORIAL COURT OF YUKON

Before His Honour Judge Cozens

REGINA

v.

MICHELLE CRYSTAL FRED

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Malcolm E.J. Campbell — Counsel for the Accused

## REASONS FOR JUDGMENT AND REASONS FOR SENTENCE

[1] COZENS T.C.J. (Oral): Michelle Fred has been charged with having committed offences contrary to ss. 253(1)(a) and (b) of the *Criminal Code*. These allegations are based upon her having had care and control of a motor vehicle as opposed to operation of a motor vehicle.

[2] The trial took place on November 9, 2018, with judgment reserved to today's date.

[3] This is my judgment.

[4] On September 2, 2016, Cst. Kidd responded to a report of a sleeping female in a blue Jeep that was parked on the side of Range Road in Whitehorse. The report was made at 3:02 p.m. and Cst. Kidd arrived at the reported location of the Jeep, a blue H3 Hummer, at 3:17 p.m.

[5] When he arrived, he noted the Hummer to be parked facing north on the northbound shoulder of the road. It was not obstructing the roadway.

[6] The Hummer was not running, and its lights were not on. The two female complainants were standing beside the vehicle. They advised Cst. Kidd that another individual had told them the vehicle had been parked in the same location a half an hour earlier.

[7] Cst. Kidd went to the driver's side of the Hummer. The window was rolled down. The sleeping female, who was the only occupant of the Hummer and subsequently identified as Ms. Fred, had her eyes closed and did not appear to him to notice him. An unlit cigarette was hanging from her mouth. The keys to the Hummer were located in the right-front passenger seat. He could not recall whether the seat was tilted back or not, whether it was a standard or automatic transmission, or whether it was in “park” or not. He stated that as a result of a prior incident, it was his habit to look whether a vehicle is in “park” or not right away and to put it in “park” if necessary. He did not have to put it into “park” in this case, so he believed the vehicle was likely in “park”. He did not recall whether Ms. Fred was wearing a seat belt.

[8] Cst. Kidd attempted to wake Ms. Fred up by knocking on the door of the Hummer and announcing himself as a police officer. Ms. Fred appeared to be very tired and to

have trouble waking up. He stated that it took more effort than usual for him to wake her. He agreed that Ms. Fred appeared to be confused throughout her dealings with him, and that it was difficult to have any kind of coherent conversation with her.

[9] He asked Ms. Fred some questions. He noted a slight odour of liquor on her breath that became stronger when she exhaled. Ms. Fred admitted to having consumed some alcohol earlier.

[10] Cst. Kidd suspected that Ms. Fred had alcohol in her body and made a demand that she provide a sample of her breath into a roadside screening device. Ms. Fred put the keys to the Hummer in the centre console and got out of the Hummer to provide a breath sample.

[11] When Cst. Thomas subsequently searched the Hummer, he located the keys in the centre console. There was no liquor located in the vehicle.

[12] A “fail” reading resulted from the breath sample.

[13] Cst. Kidd then arrested Ms. Fred for impaired driving and read her *Charter* rights to her.

[14] Once at the detachment, Ms. Fred provided breath samples into an approved instrument, and readings of 120 and 130 mg% resulted. Using the lower of these two values, 120 mg%, an expert report was filed that indicates Ms. Fred would have had an actual blood alcohol concentration of between 146 to 172 mg% at 2:15 p.m., and 136 to 151 mg% at 3:17 p.m.

[15] An Agreed Statement of Facts was filed that included some of the evidence above, as well as what Ms. Fred's brother, Kerry Fred, would have testified to.

[16] Mr. Fred recalls an occasion when he received a telephone call from Ms. Fred requesting that he provide her a ride to a friend's house in Takhini North. He told her at that time that he was unable to assist her as he had been drinking and could not drive. Mr. Fred did not remember the time or date of the phone call, and estimated it to have been about two years ago. He no longer has this telephone and cannot check the phone log as a result.

[17] Section 258(1) of the *Code* states in part that:

> (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle . . . the accused shall be deemed to have had the care or control of the vehicle . . . unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle . . . in motion…

[18] In ***R.*** v. ***Boudreault***, 2012 SCC 56, Fish J., writing for the majority, stated the law to be as follows, in paras. 9 to 13:

> 9 For the reasons that follow, I have concluded that "care or control," within the meaning of s. 253(1) of the *Criminal Code*, signifies (1) an intentional course of conduct associated with a motor vehicle; (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit; (3) in circumstances that create a *realistic risk*, as opposed to a *remote possibility*, of danger to persons or property.
>
> 10 Only the third element — realistic risk of danger — is in issue on this appeal. The Crown submits that risk of danger is not an element of "care or control" under s. 253(1) of the

> *Code*. The trial judge found that it is. With respect, I agree with the trial judge.
>
> 11 The existence of a realistic risk of danger is a matter of fact. In this case, the trial judge, applying the correct legal test, found *as a fact* that there was no such risk.
>
> 12 I recognize, as the trial judge did, that a conviction will normally ensue where the accused, as in this case, was found inebriated behind the wheel of a motor vehicle with nothing to stop the accused from setting it in motion, either intentionally or accidentally.
>
> 13 Impaired judgment is no stranger to impaired driving, where both are induced by the consumption of alcohol or drugs. Absent evidence to the contrary, a present ability to drive while impaired, or with an excessive blood alcohol ratio, creates an inherent risk of danger. In practice, to avoid conviction, the accused will therefore face a tactical necessity of adducing evidence tending to prove that the *inherent* risk is not a *realistic* risk in the particular circumstances of the case. (emphasis added)

[19] In paras. 37 to 39, Fish J. stated:

> 37 Accordingly, an accused found in the driver's seat will be presumed, as a matter of law, to have care or control of the vehicle, unless the accused satisfies the court that he or she had no intention to drive — an intention that, pursuant to *Ford*, is not an essential element of the offence!
>
> 38 At a minimum, the wording of the presumption signifies that a person who was found drunk and behind the wheel cannot, for that reason alone, be convicted of care or control if that person satisfies the court that he or she had no intention to set the vehicle in motion. Dickson C.J. made this plain in *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 19: "It cannot be said that proof of occupancy of the driver's seat leads inexorably to the conclusion that the essential element of care or control exists… ."
>
> 39 Put differently, s. 258(1)(a) indicates that proof of voluntary inebriation and voluntary occupancy of the driver's

> "care or control" under s. 253(1) of the *Criminal Code*. Something more is required and, in my view, the "something more" is a realistic risk of danger to persons or property.

[20] Fish J. further stated in paras. 41 and 42 that outside of evidence that the accused intended to drive the vehicle, a realistic risk of danger arises in three ways.

> 41 A realistic risk that the vehicle will be set in motion obviously constitutes a realistic risk of danger. Accordingly, an *intention* to set the vehicle in motion suffices *in itself* to create the risk of danger contemplated by the offence of care or control. On the other hand, an accused who satisfies the court that he or she had no intention to set the vehicle in motion will not necessarily escape conviction: An inebriated individual who is found behind the wheel and has a present ability to set the vehicle in motion — without intending at that moment to do so — may nevertheless present a realistic risk of danger.
>
> 42 …First, an inebriated person who initially does not intend to drive may later, while still impaired, change his or her mind and proceed to do so; second, an inebriated person behind the wheel may unintentionally set the vehicle in motion; and third, through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property.

[21] Fish J. then stated in paras. 45, 46, and 48 as follows:

> 45 As I mentioned at the outset, anyone found inebriated and behind the wheel with a present ability to drive will — and *should* — almost invariably be convicted. It hardly follows, however, that a conviction in these circumstances is, or should be, "automatic." A conviction will be neither appropriate nor inevitable absent a realistic risk of danger in the particular circumstances of the case.
>
> 46 The care or control offence captures a wide ambit of dangerous conduct: Anyone who is intoxicated and in a position to immediately set the vehicle in motion faces conviction on those facts alone.
>
> …

> 48 I need hardly reiterate that "realistic risk" is a low threshold and, in the absence of evidence to the contrary, will normally be the only reasonable inference where the Crown establishes impairment and a present ability to set the vehicle in motion. To avoid conviction, the accused will in practice face a tactical necessity of adducing credible and reliable evidence tending to prove that no realistic risk of danger existed in the particular circumstances of the case. (emphasis added)

[22] In ***Boudreault***, a relevant consideration was that the accused had made an alternate plan to take a taxi home. While waiting for the taxi, he sat in his running truck with the heater turned on in order to allow him to keep warm. In the unusual circumstances of that case, once the taxi arrived, the taxi driver, noting Mr. Boudreault to be asleep, called the police, who charged Mr. Boudreault with having care and control, contrary to s. 253(1). Not, I would think, a particularly good advertising strategy for that taxi company.

[23] In paras. 51 to 53, Fish J. discussed the relevance of an alternate plan as follows:

> 51 One of the factors of particular relevance in this case is that the accused took care to arrange what some courts have called an "alternate plan" to ensure his safe transportation home.
>
> 52 The impact of an "alternate plan" of this sort on the court's assessment of the risk of danger depends on two considerations: first, whether the plan itself was objectively concrete and reliable; second, whether it was in fact implemented by the accused. A plan may seem watertight, but the accused's level of impairment, demeanour or actions may demonstrate that there was nevertheless a realistic risk that the plan would be abandoned before its implementation. Where judgment is impaired by alcohol, it cannot be lightly

> assumed that the actions of the accused when behind the wheel will accord with his or her intentions either then or afterward.
>
> 53 For example, even where it is certain that the taxi will show up at some point, if the accused occupied the driver's seat without a valid excuse or reasonable explanation, this alone may persuade the judge that "his judgment [was] so impaired that he [could not] foresee the possible consequences of his actions": *Toews*, at p. 126, again citing *Price*, at p. 384. The converse, however, is not necessarily true. Even where it is probable that the taxi will appear at some point and the accused occupied the driver's seat *with* a valid excuse or reasonable explanation, the trial judge may nonetheless be satisfied beyond a reasonable doubt that there remained a realistic risk of danger in the circumstances.

[24] It is clear that whether a realistic danger exists in the particular circumstances is a finding of fact for the trial judge to determine. In ***Boudreault***, the trial judge found that there was no risk that Mr. Boudreault would at any point, whether intentionally or unintentionally, set the vehicle in motion. The acquittal of the trial judge, overturned on appeal, was restored.

[25] In ***R.*** v. ***Smits***, 2012 ONCA 524, decided before ***Boudreault*** was released, the Court stated in paras. 60 to 64:

> 60 Although the courts below have applied different modifiers, what all the authorities, including this court, seem to be saying is that in order to establish that an accused has created a risk of danger in change of mind cases, the Crown must demonstrate a risk that an accused, while impaired, would change his or her mind and put the vehicle in motion. That risk must be based on more than speculation or conjecture. Saying that any person whose ability to operate a motor vehicle is impaired to any degree might change his or her mind is not sufficient. The trier of fact must examine the facts that determine if there is an evidentiary foundation that such risk of danger exists.

61 I appreciate that this task is not without its challenges because a finding of whether a risk of danger arises in circumstances where an accused is not actually driving requires the trial judge to engage in an assessment of what in all the particular circumstances may occur in the not too distance future. However, that is all part of the fact-finding process for the trier of fact.

62 Whether a risk of danger arises on the facts is determined by assessing circumstantial evidence. The following comments from Watt J.A. in his text *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2011) at p. 43, illustrate the approach that must be taken:

> Where evidence is circumstantial, it is critical to distinguish between inference and speculation. *Inference* is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be *no* inference without objective facts from which to infer the facts that a party seeks to establish. If there are *no* positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture.

63 In *Szymanski*, at para. 93, Durno J. provides an excellent, although non-exhaustive, list of factors a court might look at when engaging in a risk of danger analysis on the basis of circumstantial evidence:

(a) The level of impairment, which is relevant to the likelihood of exercising bad judgment and the time it would take for the accused to become fit to drive;

(b) Whether the keys were in the ignition or readily available to be placed in the ignition;

(c) Whether the vehicle was running;

(d) The location of the vehicle;

> (e) Whether the accused had reached his or her destination or if the accused was still required to travel to his or her destination;
>
> (f) The accused's disposition and attitude;
>
> (g) Whether the accused drove the vehicle to the location where it was found;
>
> (h) Whether the accused started driving after drinking and pulled over to "sleep it off" or started using the vehicle for purposes other than driving;
>
> (i) Whether the accused had a plan to get home that did not involve driving while impaired or over the legal limit;
>
> (j) Whether the accused had a stated intention to resume driving;
>
> (k) Whether the accused was seated in the driver's seat regardless of the applicability of the presumption;
>
> (l) Whether the accused was wearing his or her seat belt;
>
> (m) Whether the accused failed to take advantage of alternate means of leaving the scene;
>
> (n) Whether the accused had a cell phone with which to make other arrangements and failed to do so.
>
> 64 Adapting the language in *Wren* to the facts of this case, the question becomes — did the conduct of the respondent in relation to the motor vehicle create a risk that the respondent, while impaired, would put the vehicle in motion and thereby create a danger?

[26] In the present case, the only issue for me to decide is whether a realistic risk of danger existed in that Ms. Fred, who at the moment that she was observed by

Cst. Kidd, had no present intention to drive, could wake up and, while still impaired, decide to drive.

[27] I am satisfied with respect to the other two prongs of the ***Boudreault*** considerations, that there was not a realistic risk that Ms. Fred might accidentally set the vehicle in motion, and further that the vehicle did not, where it was parked, endanger any persons or property.

[28] Ms. Fred was occupying the driver's seat of the Hummer while impaired by alcohol, and therefore the presumption of care and control is present. There is no evidence as to the reason or purpose that Ms. Fred occupied the driver's seat of the vehicle. For example, there is no evidence that she did so in order to wait for a ride from a cab, a friend, a relative, or in order to keep warm in cold weather until she could work out an alternate plan.

[29] The only evidence I have with respect to an alternate plan is that of Mr. Fred. His evidence, however, is not helpful. Not only can he not say with any degree of certainty the date and time when this request for a ride was made, on that occasion he told Ms. Fred that he could not help her. And while on that occasion there may have been an intention by Ms. Fred to try to obtain a ride and not drive herself anywhere, assuming she had the availability of an operating vehicle, her request for assistance was denied. We do not know what she would have done on that occasion, and we cannot say with requisite certainty that that occasion is in fact the occasion that is before the Court from which these charges were laid.

[30] Even were I to have been satisfied that Mr. Fred was able to confirm that this call to him had been made by Ms. Fred on September 2, 2016, and that this call had been made while Ms. Fred was sitting in the parked Hummer where she was located, Mr. Fred's evidence would not particularly assist Ms. Fred. There was no ride coming for Ms. Fred. There was no plan. In such a circumstance, the fact that Ms. Fred was sleeping in the Hummer after having tried to get alternate transportation does not mean that there was no realistic risk that she would decide to drive when she awoke.

[31] We have no evidence from Ms. Fred as to what her actions had been and where she intended to go such that I could be satisfied that there was no realistic risk she may, while still impaired, have decided to drive after she woke up.

[32] There is no evidence that Ms. Fred was the individual who drove the Hummer to the location where she was located in the driver's seat of the vehicle. Having been located in the driver's seat, however, and in the absence of any evidence as to the existence of an alternate driver, while I cannot state with certainty that she drove there, I would be hard pressed to consider otherwise. Regardless of the lack of evidence as to whether Ms. Fred drove to the location or not, Ms. Fred was situated in the driver's seat. She knew where the keys were located in a readily accessible location, and prior to exiting the vehicle, she placed the keys in the center console.

[33] In order for Ms. Fred to avoid being convicted for having committed the ss. 253(1)(a) and (b) offences, there must be reliable and credible evidence that there was no realistic risk of danger, in the circumstances, that Ms. Fred would put the vehicle in motion at some point while she was still impaired by alcohol. In order to so find, there

must be reliable and credible evidence of a plan that would in fact be implemented. There is no such evidence in this case.

[34] While the Hummer was likely in park and was not running, it would have been a relatively simple operation to use the readily accessible keys to start the Hummer and drive away. The fact that a vehicle is in park and not running does not eliminate a realistic risk of danger that the accused may decide to start the vehicle and operate it.

[35] Ms. Fred was not sleeping in the rear seat of the vehicle, which she likely easily could have done were she simply intending to sleep until she figured out how to get where she was going without driving while she was legally unable to. This is not a factor that I am relying on in order to determine that Ms. Fred may have driven at some point, rather, it simply means I do not have such evidence that could be argued as being supportive of a finding that there was no realistic possibility that Ms. Fred would decide at some point to drive away while still impaired.

[36] I appreciate the public policy argument asserted in ***R.*** v. ***Martindale*** (1995), 45 C.R. (4th) 111 (B.C.S.C.) and other cases impaired drivers should not be discouraged from deciding not to drive and pulling the vehicle over to a safe place.

[37] I also understand that as in ***Martindale*****,** numerous courts following the ***R.*** v. ***Toews***, 2 S.C.R. 119, decision have held that the mere possibility of future change of mind is insufficient to establish beyond a reasonable doubt that there was a risk of danger posed by the accused.

[38] However, in order to overcome the reasonable inference that ***Boudreault*** says should be drawn when an inebriated person occupies the driver's seat of an operable vehicle that a realistic risk of danger exists, Ms. Fred is required to adduce some evidence or satisfy the Court from evidence that otherwise exists, that her occupancy of the driver's seat of the Hummer was not care and control of the vehicle in a manner that posed a realistic risk of danger to the public. That is what ***Boudreault*** states.

[39] Ms. Fred has failed to do so in this case. There is no reliable and credible evidence before me that satisfies me that there was not a realistic risk of danger that Ms. Fred:

> . . . who initially [did] not intend to drive may later, while still impaired, change her mind and proceed to do so . . .

— to reiterate the words of Fish J. in ***Boudreault***.

[40] I am further satisfied, based upon the evidence, that Ms. Fred was in care and control of the Hummer while she was not only over 80 mg%, but that she was impaired by alcohol at the time.

[41] As such, Ms. Fred is convicted of s. 253(1)(a) and (b) offences. Pursuant to the principle in ***R.*** v. ***Kienapple***, [1975] 1 S.C.R. 729, the s. 253(1)(a) charge is conditionally stayed.

[DISCUSSIONS]

[42] Michelle Fred has been convicted of having care and control of a motor vehicle while she had a blood alcohol level of over 80 mg%.

[43] This matter proceeded to trial. The facts were not really in dispute; it was a legal argument as to whether the circumstances constituted care and control such that a conviction should be entered. I found that it did.

[44] Ms. Fred's readings were under the statutory level for an aggravated reading. They were 120 mg% at the time that the breath samples were taken. There were extrapolations that would have raised that at the time the officer attended, but Crown is not seeking anything more than the minimum in this case, notwithstanding that it went to trial, due to the nature of the issues that were argued at trial.

[45] Ms. Fred is 36 years of age, and a member of the Kwanlin Dün First Nation. She has no prior criminal convictions. There are some difficult life circumstances; I do not need to say any more.

[46] The minimum is appropriate, in my opinion, in this case.

[47] There will be a $1,000 fine and there will be a prohibition from operating a motor vehicle on any street, road, highway, or public place for a period of one year, subject of course to any approval by the Territorial Government about offering an interlock system after three months, I believe it is. I do not believe there is anything further required.

[48] There will be an order that needs to be signed by Ms. Fred.

[49] There will be six months' time to pay on the fine. If any more time is needed, of course, that application can be brought before the court.

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COZENS T.C.J.