Citation: *R. v. Krizan*, 2015 YKTC 45 Date: 20151216
Docket: 14-00291A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

PETER ZIGMUND KARK KRIZAN

Appearances:
Paul G. Battin Counsel for the Crown
Vincent Larochelle Counsel for the Defence

RULING ON *CHARTER VOIR DIRE*

[1] Peter Krizan is before the Court on three alleged breaches of the *Criminal Code of Canada* from 23 April 2015.

[2] The precise nature of the breaches is different on the three charges so I will set them out:

> COUNT # 1: On or about the 23rd day of April in the year 2015 at the City of Whitehorse in the Yukon Territory, did being at large on his recognizance given to a justice and being bound to comply with a condition of that recognizance without lawful excuse failed to comply with that condition, to wit: Not possess or consume alcohol, contrary to Section 145(3) of the *Criminal Code*.
>
> COUNT #2: On or about the 23rd day of April in the year 2015 at the City of Whitehorse in the Yukon Territory, did

> being at large on his recognizance given to a justice and being bound to comply with a condition of that recognizance without lawful excuse failed to comply with that condition, to wit: Have no contact directly or indirectly or communication in any way with Benita Allison if you are under the influence of alcohol, contrary to Section 145(3) of the *Criminal Code*.
>
> COUNT #3: On or about the 23rd day of April in the year 2015 at the City of Whitehorse in the Yukon Territory, did, while being bound by a probation order made by Judge B.E. Schmaltz in Yellowknife, Northwest Territories on the 7th day of April, 2014, fail without reasonable excuse to comply with such order, to wit: If you have been drinking any alcohol at al[l] within the previous 24 hours, you are to have no contact with Benita Allison, contrary to Section 733.1(1) of the *Criminal Code*.

[3] The defence argues his rights were violated under s. 9 of the *Charter of Rights,* which reads as follows: "Everyone has the right not to be arbitrarily detained or imprisoned".

[4] Specifically, the defendant seeks an order granting the exclusion of "all evidence obtained following and incident to the arrest".

[5] The proceedings started off with a *voir dire*. The defence called Joe Allison, the father of Benita Allison.

[6] Joe Allison was hosting a social event at his mobile home in a trailer park outside of the downtown core of Whitehorse. Benita Allison was the girlfriend or partner of the defendant. The defendant and Ms. Allison did not live there, nor did they have a key. They were simply guests.

[7] Cst. Greer was on general patrol duties and found himself in that trailer park after midnight, about 40 minutes after the defendant had arrived at the event. There was no

complaint which caused Cst. Greer to be there. Upon his patrol there, he noticed a recreational vehicle ("RV") parked in the middle of the road. It was running and the lights were on. No one was inside. The RV was blocking the free flow of traffic and was a danger in the event of an emergency.

[8] To deal with that problem, Cst. Greer approached the Joe Allison residence where he knocked loudly on the door a number of times. There was no response. He could hear music from inside. Cst. Greer stepped back on the porch and in a side window he could see Joe Allison and at least one other person. The Constable went back to the door, knocking loudly again. This time, the owner, Joe Allison answered.

[9] The Constable asked Mr. Allison to move the RV. Mr. Allison would not because he had been drinking but sent a young man to a neighbour to arrange the location change for the RV.

[10] The conversation between the Constable and the homeowner was civil. Although Joe Allison had consumed eight to nine beers, he was calm and not intoxicated.

[11] In the meantime, Cst. Sweetville arrived and the two of them discussed bringing in a tow truck as still no one had moved the RV.

[12] Cst. Greer, from the road, looked in the front window and saw the defendant and Benita Allison inside the dwelling. From a previous briefing, he was aware that both had court ordered no contact provisions, the concern being domestic violence.

[13] A check on the RV revealed it was owned by Joe Allison, but had been lent out to others. Cst. Greer knew from previous police business that it was being used by the defendant and Benita Allison.

[14] Cst. Greer returned to the residence of Joe Allison. Mr. Allison came to the door without delay. Cst. Greer told him that he had seen the defendant and Benita Allison inside and that both were subject to no contact orders. He asked Joe Allison if he could enter the mobile home. Initially hesitant, Joe Allison allowed the officer in, after a discussion in which Cst. Greer told him he had concerns for Benita Allison. Joe Allison, who was aware of the past difficulties with the defendant and Benita Allison, let the police in.

[15] Joe Allison testified that the police were aggressive and very loudly knocked on his door. He was convinced it was only once. In fact, Cst. Greer talked to him at the door twice. I am not concerned about the loud, persistent knocking at the door. If it were a neighbour (not the police) who wanted to get his vehicle past the RV, the neighbour would have knocked as loud or louder. After all, there was a party going on with music which could be heard from outside.

[16] Furthermore, Joe Allison stated that Cst. Greer threatened him with an obstruction charge and being arrested himself. Also, he maintains the Constable did not tell him why they wanted the defendant. Just as Mr. Allison's memory is wrong on the number of times Cst. Greer came to his door, so he is wrong here.

[17] Mr. Allison was also wrong about his window drapes being down so as to preclude visibility from the road. While it may have been his normal practice to have the

drapes covering the window, it was not the situation here as Cst. Greer testified that he could see inside the mobile home.

[18] Cst. Greer told him about the conditions of bail for the defendant and it was his fatherly concern for his daughter that prompted him to let the officers in.

[19] Cst. Greer did not say to Joe Allison that he did not have to let him in. Mr. Allison had consumed eight or nine beers but was not intoxicated. In terms of fear of the police and being on an unequal footing, this was clearly not the case here. Joe Allison had been visited by the RCMP on about 10 occasions before and on two occasions had refused them entry.

[20] Cst. Greer announced the presence of police and proceeded to arrest the defendant who was co-operative, other than protesting that the no contact provisions only applied if he was under the influence of alcoholic beverages. At the time of the arrest, Cst. Greer had no belief that the defendant was drinking, but within seconds of putting him under arrest he could smell liquor from his breath. There were no other signs of alcohol consumption.

[21] Benita Allison was arrested by Cst. Sweetville.

[22] Neither Cst. Greer nor Cst. Sweetville had a warrant to arrest either the defendant or Benita Allison. They did not need one as they were allowed in the home by the owner and exercised their powers under s. 524(2)(a) of the *Criminal Code*.

[23] Also, Joe Allision was surrounded by a number of people at a party which he was hosting. He told us he felt he did not have a choice but to let the police in. His memory

may have been faulty on a few points, but surely he would have remembered that the police had been there several times before. Indeed, he testified that he recognized this particular Constable who had been there before.

[24] Based on these facts, it was unnecessary for the police to specifically tell Mr. Allison that he did not need to let them in. Joe Allison provided an informed consent. His situation was vastly different than a shy, frail 75 year old widow, not fluent in English and partially deaf, home at midnight only in the company of her ragdoll cat. At that extreme end of the spectrum and in many scenarios in between, the police would have to take a much different approach.

[25] The police were lawfully in the residence of Joe Allison. A Feeney warrant (*R. v. Feeney*, (1997) 2 S.C.R. 13 s S.C.R. 13) was not required.

[26] Let us now examine the wording of s. 524(2)(a) of the *Criminal Code*. Notice "has contravened or is about to contravene".

> 524 (2) Notwithstanding anything in this Act, a peace officer who believes on reasonable grounds that an accused
>
> *(a)* has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking or recognizance that was issued or given to him or entered into by him,…
>
> may arrest the accused without warrant.

[27] Because the defendant was on a bail recognizance, s. 524 (2)(a) is the relevant *Criminal Code* provision as opposed to the more general s. 495 (2).

[28] The police could see empty beer cans. They knew there was a party. Cst. Greer knew that the defendant and Benita Allison used the RV. Joe Allison told Cst. Greer that the people to whom he had loaned the RV couldn't move it because they were drinking. The police honestly, but mistakenly, believed there was a blanket no contact provision.

[29] Under these circumstances they were duty bound to effect the arrests as they did. They would have been in neglect of their duty to sit idly by or ignore the presence of the defendant and Benita Allison at this party and await an escalation.

[30] There was much confusion with police communication that early morning, shortly after midnight. Cst. Greer thought that there was just a simple "no contact" provision on two orders, probation and recognizance. There was no work station in the patrol car. It appears that someone at CPIC made a mistake. It was busy on the police radio so Cst. Greer went on his cellphone to try to nail down the specifics of these orders.

[31] Clarity was not attained until several minutes later back at the detachment, that there was a probation order from the Northwest Territories and a recognizance from the Yukon. Both had provisions for no contact either if under the influence of alcohol or if drinking alcohol.

[32] It is likely that this clarity would not have been attained until such time as Cst. Greer returned to the station. He tried hard to find out the details at the scene, but to no avail.

[33] Technically, Cst. Greer did not have an honest and well-founded belief before the arrest that the defendant had consumed alcohol but he knew within seconds that in fact the defendant had liquor on his breath.

[34] Also, it could be said that Joe Allison's permission to enter was based on wrong information, ie. the bare no contact provision. This case, though, is not concerned about any violation of the rights of Joe Allison. Also there was absolutely no intent by the officers to trick Joe Allison. Cst. Greer told him what he honestly, but wrongly, believed to be true.

[35] The arrest of the defendant was justified on both the subjective and objective bases that he was at least "about to contravene" the recognizance arrest of Peter Krizan.

[36] If I am wrong on this, then there was a violation of s. 9 *Charter* right of Peter Krizan. With the facts of this case, I must now embark on the *Grant* analysis. The *Grant* framework is succinctly stated by Veale J. in *R. v. Gaber*, 2015 YKSC 38 at paras. 43 and 44:

> In *R. v. Grant,* 2009 SCC 32, the Supreme Court of Canada reiterated the purpose and focus of s. 24(2) and set out the factors relevant to its application. The section is essential to maintaining the integrity of, and public confidence in, the justice system (para. 68). It has a prospective and societal focus, and is aimed at systemic concerns (paras. 69 and 70). An inquiry under s. 24(2) is objective and asks whether a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute (para. 68).

> The factors to be considered are: (i) the seriousness of the *Charter*-infringing state conduct, (ii) the impact of the breach on the *Charter*-protected interests of the accused, and (iii) society's interest in the adjudication of the case on its merits.

[37] The *Charter*-infringing state conduct is not particularly serious. The police officer was well intentioned. He purposely went the extra mile to determine the exact probation and bail terms. The RCMP should, in this technological age, have better and more accurate communications. There was absolutely no malice towards, nor targeting of the defendant.

[38] In *Gaber* at para. 59, Veale, J. stated that "a breach can have a fleeting and technical impact or it can have a profoundly intrusive impact".

[39] The defendant was taken to the detachment and released the same day. He lost a few hours of freedom. There was no evidence of a strip search or search of the RV he had borrowed, nor any evidence of physical or psychological harm. He put himself in a precarious position by being at a party, consuming alcohol and being in the presence of Benita Allison.

[40] Society has a very important interest in the adjudication of this case on its merits. The judicial system can only operate if there is a respect for and compliance with court order.

[41] Under a previous Liberal administration, the penalties for breach of probation were increased substantially. C-41 came into force on 3 September 1996.

[42] From *Hansard, House of Commons*, 20 September 1994 it was stated by Russell MacLellan, Parliamentary Secretary to Minister of Justice, Allan Rock:

> We are also saying to those who are on probation that if they break probation they break the trust of society. They are not only breaking the trust of the criminal justice system. They are breaking the trust of society that wants to give them a chance. We do not want to impose incarceration. We want to give them the benefit of the doubt as much as possible because we think they are worth it. Now, if a person violates probation then he or she is breaching that trust. We are saying in Bill C-41 that there should be harsher penalties for those who breach their probation.

[43] Society has an interest not only in reducing victimization by crime, but also promoting community based sanctions like probation and judicial interim release rather than remand in custody. Therefore cases of breach of bail and probation should be heard. The justice system suffers when court orders are ignored.

[44] While there are anecdotal observations of a rather high percentage of breach charges in this jurisdiction, it shows courts are willing to have accused persons and offenders in the community, despite the risks associated thereto.

[45] Returning to the test in *Grant,* it seems to me that the balance would be clearly in favour of inclusion of the evidence by Cst. Greer that the defendant had been drinking. The exclusion of this evidence would negatively impact the administration of justice, the inclusion much less so. I believe that this view would be shared by reasonable people aware of the *Charter* and the facts of this case.

_____

LUTHER T.C.J.