

Citation: *R. v. Linklater*, 2004 YKTC 2

Date: 20040114
Docket: T.C. 03-00360
Registry: Whitehorse

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

R e g i n a

v.

Richard William Linklater

Appearances:
David McWhinnie
Gord Coffin

Counsel for Crown
Counsel for Defence

RULING ON VOIR DIRE

[1] Mr. Linklater was arrested on an outstanding federal parole violation warrant around 8:30 p.m. on September 16, 2003. He was interviewed by R.C.M.P. Constable Tracy Phillips (as she then was) beginning around 2:30 a.m. The interview lasted one hour and twenty minutes. At issue is the admissibility of inculpatory statements made by Mr. Linklater during this interview.

[2] Mr. Coffin, on behalf of Mr. Linklater, submits that the statements were not voluntary. Mr. Coffin raises the following concerns: the inculpatory statements were induced by the promise that things would go better; the circumstances of the interview were oppressive; and due to a lack of sleep and being on drugs for several previous days, there is an issue as to whether Mr. Linklater had an "operating mind". As the inculpatory statements were given to a person in authority, the obligation falls on the Crown to establish beyond a reasonable doubt that it was "voluntary".

[3] Mr. Linklater was arrested for an outstanding federal parole warrant by Constable Tracy Phillips in the presence of Constable Lagimodierre, in front of the Toronto Dominion Bank on Main Street, Whitehorse around 8:30 p.m. on September 16, 2003. Constable Lagimodierre transported him to the police detachment where he was booked. Mr. Linklater had access to and consulted with a lawyer.

[4] The Roadhouse Off Sales-Liquor Outlet was robbed around 11:00 p.m. on September 15, 2003, the day before Mr. Linklater's arrest, by an individual wielding a knife. Based on the images on the security tape, Constable Phillips identified Mr. Linklater as a "person of interest" whom she wanted to interview. A day earlier, on September 14, 2003, an individual attempted to rob Riverside Grocery while armed with a hypodermic needle. Constable Phillips believed the two incidents were related.

[5] Constable Phillips conducted a photo lineup between 12:22 a.m. and 12:28 a.m. on September 17, 2003 with the clerk who was working in the Roadhouse Off Sales-Liquor Outlet when it was robbed. Mr. Linklater's photo was identified by the clerk as matching the robber. As a result of the positive identification, Constable Phillips interviewed Mr. Linklater for one hour and twenty minutes beginning at 2:31 a.m. on September 17, 2003.

[6] The interview was video and audio taped, although the video was not introduced to the Court as an exhibit. The written transcript was filed with the Court. The interview begins with Constable Phillips making "small talk" with Mr. Linklater and reviewing his legal rights. On two occasions (page 5 and page 6) Constable Phillips advises Mr. Linklater of his right to remain silent. The first time that Constable Phillips asks Mr. Linklater about the robbery, he tells her "I don't have nothing to say" (page 9). Constable Phillips then changes the subject, talking to and questioning Mr. Linklater on his family, home life and previous

experiences. Mr. Linklater is forthcoming about his alcohol and drug problems (pages 23 to 25), his relationship with his girlfriend (pages 26 to 28) and being likely to end up back in jail on the outstanding federal warrant.

[7] Constable Phillips attempts to get Mr. Linklater to talk about the robbery again (pages 33 to 34) but he tells her on four separate occasions that he is not going to talk about it.

[8] Mr. Coffin points to the discussion on page 34 as constituting an improper inducement to get Mr. Linklater to open up. Constable Phillips starts this dialogue by pointing out that Mr. Linklater is going back to jail:

...

Q: Ummm, all I can say is that you are going back, right

A: Uh huh

Q: and as a cop talking to you I'm saying let's deal with it now

A: yeah

Q: You're going back, let's get the ball rolling on these charges. Let's get them moving, let's not stagnate here. Do you know what I'm saying?

A: Yeah

Q: Like you know how it works

A: Yeah

Q: You know how it works better than I do. Let's go in and do your time and get it done with and come out and be done with it and that's what I'm giving you an opportunity to do. I'm giving you an opportunity right now to tell me your side of what happened, because right now I've only got the sides of the other two people, granted I believe them and I've got the

evidence, I've got the video with you on it and I've got your jacket and I've got all that shit but I don't, what I don't have is your side, your perspective and that to me is really important. Like I've got you I.D.'d through photo-line-ups that I showed, okay

A: Uh huh

Q: Its all signed off. We've got the video, videos I should say. Videos, the stills have been pulled off, we've got your clothing. Are you familiar with how, and I'm not trying to put your back up against the wall here at all

A: Yeah

...

[9] Mr. Coffin says that the officer is essentially telling Mr. Linklater that things would go better if he cooperates. As an inducement, it is not very effective, because Mr. Linklater again refuses to say anything about the robbery (pages 35 and 36). Notwithstanding Mr. Linklater's refusal to speak, Constable Phillips makes it very clear that she is in no position to make any deals with him:

...

Q: the fact that you're, you're going to be going back

A: Yes, I heard you

Q: anyway

A: Yes

Q: Like if you go back and you do your, all I'm saying like I, I'm not in any position to make you any deals, okay

A: Uh huh

Q: I can't do that, its not

A: Yeah

Q: my, I'm not a lawyer and I'm not a judge and I can't do that

A: Yeah

Q: but the way I look at it is in your position right now where you know you're going to be going and we know you did it and we can prove you did it. We got the video, we got the clothing. I don't know if you know, but we can even, we got a hundred percent positive I.D. on you. Like that's pretty, it's pretty good evidence

...

[10] Mr. Linklater, again, refuses to respond to Constable Phillips' questions dealing with the robbery (pages 37 and 38). Mr. Linklater appears to be quite willing, however, to continue to speak to her about other matters. At no time during the entire interview does he ask to be taken back to his cell nor does he tell her that he does not want to talk to her anymore.

[11] Mr. Coffin points to the exchange at the bottom of page 39 as constituting an improper inducement to confess:

...

Q: ... So I got to compare that too so there is still a little bit of work that needs to

A: Yeah

Q: be done but, but its done and I have enough to lay the charge and I'm going to lay the charge in the morning so basically bottom line is you can deal with it now or you can deal with it uhh, you know, a year from now or six months from now when it goes to trial or whatever it does and I'm confident we'll convict you for sure

A: Yeah

Q: I mean its your opportunity to give me a reason. Just give me a reason. Doesn't even have to be a good one, cause I'll listen to anything

A: Don't remember, that's all I'm saying now

...

[12] In particular, he relies on the words "... and I'm going to lay the charge in the morning so basically bottom line is you can deal with it now or you can deal with it, uhh, you know, a year from now or six months from now ..." as suggesting that not talking now could have negative consequences for Mr. Linklater.

[13] The conversation that follows indicates that Mr. Linklater had been using drugs the night before and Mr. Coffin suggests that this relates to whether he had an "operating mind". During this dialogue, for the first time, Mr. Linklater makes a statement that connects him to the robbery:

...

Q: You don't remember it?

A: No

Q: Why don't you remember it?

A: Cause I was pretty fucked up last night, last night I believe

Q: Yeah. You know you did it but the details are fuzzy are they?

A: (INAUDIBLE)

Q: How come you were so fucked up?

A: I was drinking and using some drugs

Q: Umm, heroin?

A: Uhh, yeah

Q: Or was it just uhh, crack?

A: Both

Q: A little bit of both. How much, more than usual?

...

[14] Having admitted his involvement in the Roadhouse Off Sales-Liquor Outlet, Mr. Linklater proceeds to answer Constable Phillips numerous questions about various aspects of the robbery (pages 40 to 52).

[15] When Constable Phillips changes the topic to the attempted robbery of Riverside Grocery (pages 52 and 53), Mr. Linklater is not forthcoming in his answers. At this point, Mr. Linklater raises the possibility of Constable Phillips helping him out (pages 53 to 55):

...

A: What kind of help are you going to help me out with. What are you, what, when are you going to help me with

Q: What am I going to help you

A: Yeah

Q: out with?

A: Yeah

Q: Well that's tough

A: You told me you'd be able to help me out

Q: I didn't tell you that

A: Or something like that

Q: Who told you that?

A: You

Q: With your conscience?

A: Yeah

Q: With your conscience that, that's what I'm hoping to help you out with is your own conscience and dealing with this swiftly instead of letting it go but I mean I certainly have not promised, like I can't

A: Yeah

Q: I kind of already told you that. I know you're in a shitty situation

A: Yeah

Q: But I mean the way I see it is there's only one way to go and its to tell the truth and just deal with it, like you say you usually just deal with it

A: What if I was able to help you guys out with a few boys in town

Q: With a few boys in town. Well I'm going to tell you something

A: We'll work a deal or something

Q: Yeah I know what you're saying. Umm,

A: Yeah I know a few big boys in town

Q: I do too

A: Yeah

Q: Yeah

A: Got offered a couple of jobs and

Q: Yeah, well anything that we would talk about of something else would be in a separate conversation because I would never put you at risk

A: Yeah

Q: I would not talk to you on an audio and videotape about anything like that

A: Yeah

Q: Right now all I can do is deal with the two things I've been tasked to deal with today. That's all I can do

A: Yeah

Q: I can't say give me some drug info and I go do a bust and I let you, I can't, I'm...

A: Yeah

Q: sorry

A: Yeah

Q: And I would love to work with you but it's not the way...

A: Yeah

Q: I can't do my job like that

A: Yeah

Q: Umm, we can talk after and no tapes on and talk about something totally separate from this stuff. I'm just being honest like I'm, I'm not going to fuck you around here

A: Yeah

Q: I just can't. I mean I know there's a lot of stuff going on and we got lots of intelligence coming in. Like we have lots of sources too right

A: Yeah

Q: but umm, I, I don't want to talk about that on this

A: Yeah, yeah

Q: because this would jeopardize your safety

A: Yeah

Q: If it ever got

A: Yeah

Q: in the wrong hands. Okay, do you understand what I'm saying?

A: Yeah

Q: So we can go back to that when we're done if, if you still want to, okay. Umm, you didn't get anything from the other one at the Riverside?

...

[16] Mr. Coffin submits that this discussion is consistent with Mr. Linklater believing he was entitled to more favourable treatment, as a result of an arrangement, promise or inducement. Mr. McWhinnie, for the Crown, characterizes this exchange as Mr. Linklater fishing for a deal, believing the police have enough evidence to convict him. Mr. McWhinnie also refers to Constable Phillips' comment that any help that she would provide would be with Mr. Linklater's conscience, a tactic which the Courts have held to be acceptable.

[17] The questioning then continues, and Mr. Linklater answers a number of questions which incriminate him in relation to the September 14, 2003 attempted robbery of Riverside Grocery.

The Law

[18] In a relatively recent decision, the Supreme Court of Canada reviewed the law applicable to the admissibility of confessions made to police officers in *R. v. Oickle*, [2000] 2 S.C.R. 3. Iacobucci, J. writing for the majority, indicated that the law had broadened from an earlier perspective that confessions were only inadmissible where police had made explicit threats or promises to the accused

(*Ibrahim v. The King*, [1914] A.C. 599 (P.C.); *Boudreau v. The King*, [1949] S.C.R. 262). Iacobucci stated that the law focuses not just on reliability but also on voluntariness broadly defined, which the Crown must prove beyond a reasonable doubt. This comprehensive restatement of the law applicable to confessions to persons in authority clarifies and in some respects changes the law significantly. It follows that earlier decisions must be read carefully with *Oickle* as the new reference point.

[19] It is now clear that the admissibility of confessions is not governed by hard and fast rules. A wide range of circumstances may impact on admissibility and these have to be evaluated contextually. The trial judge is mandated to consider all the relevant factors and to understand the circumstances surrounding the confession. The confession should be excluded if it gives rise to a reasonable doubt as to its voluntariness, taking into account all aspects of the rule.

[20] In *Oickle*, the court stated the primary reason for ensuring voluntariness is that involuntary confessions are likely to be unreliable. The court pointed out that although most people find it difficult to accept anyone would confess to a crime they did not commit, a large body of literature and wrongful convictions reveal false confessions do occur. Under certain circumstances, people who are not guilty of an offence may confess to having committed it.

[21] Iacobucci outlines several factors that can create such circumstances. The first deals with conditions either during or before the interrogation process. In such a situation, the conditions are so oppressive that the suspect confesses to escape the stressful circumstances. Examples include "...depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time." (para. 60).

[22] The second factor arises when the police officer attempts to coerce the suspect into confessing through either the promise of a benefit in exchange for a confession, or the threat of prejudice if a confession is not given. In either case, the suspect knowingly provides a false confession in exchange for a future benefit or reduction of harm. The most egregious sort of promise is one where an officer promises to ensure a lenient court sentence if the suspect confesses. At paragraph 49 of *Oickle*, the Court states “An explicit offer by the police to procure lenient treatment in return for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances.” The court goes on to discuss other types of inducements such as an offer of psychiatric assistance or other counseling in exchange for a confession. It indicates that such offers are not as strong an inducement as an offer of leniency, and must be analysed within the context of the interrogation as a whole. A specific example arises in *R. v. Ewert* (1992), 76 C.C.C. (3d) 287 (S.C.C.), where the Supreme Court of Canada upheld the trial judge’s finding that a “...bold offer to the accused to help him, in the sense of providing psychiatric help...” was not sufficient inducement to render the subsequent confession involuntary.

[23] *Oickle* provides guidance on the types of threats that can result in an involuntary confession. Referring to statements by police officers such as “it would be better if you told the truth”, the court states that such comments “...require exclusion only where the circumstances reveal an implicit threat or promise.” (para. 55).

[24] The third factor that Iacobucci identifies as potentially causing an involuntary confession occurs when the officer persuades the innocent suspect that they actually did commit the offence. This involves convincing the suspect that their memory is not reliable. The suspect then adopts the sequence of events as related by the officer. It should be noted that this subconscious construction of a memory in the mind of the suspect results in an actual belief of their guilt. As a result, the suspect feels they are being truthful when giving the

confession. Guidance in issues of this type has been provided by the Supreme Court of Canada in three cases: *Horvath v. The Queen* (1979), 44 C.C.C. (2d) 385 (S.C.C.); *Ward v. The Queen* (1979), 44 C.C.C. (2d) 498; and *Whittle v. The Queen*, 92 C.C.C. (3d) 11 (1991). Looking first at the older cases, in *Horvath* the seventeen-year-old accused was subjected to two intense interrogations. After the second interrogation he was left alone and subsequently engaged in a monologue during which he made a confession. The seven member Supreme Court of Canada was split on the decision. Spence, and Estey J. J., supported the trial judge's conclusion that the accused had suffered a complete emotional disintegration. Concurring in the result, Beetz, and Pratte, J. J., supported a different finding that accepted the testimony of a psychologist called by the defence who indicated the interrogating officer had inadvertently hypnotized the accused. The other three judges held that the confession was not involuntary. In the second case, *Ward*, a confession was held to be involuntary where the accused had made a statement immediately after an automobile accident. The court held that the accused was still in a state of shock when the confession was made, and hence did not have an operating mind. In *Whittle*, the court held that the operating mind requirement "does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment." In *Oickle*, the Supreme Court of Canada adopted the reasoning in this earlier decision. This mental requirement is much lower than that required for consent, as suggested by the defence. The 'operating mind' does not require an informed choice whether to speak to the police nor does it require an understanding of the consequences of so doing.

[25] It must be noted that the three factors identified in *Oickle*, oppression, coercion and persuasion, do not exist in isolation. At paragraph 58 Iacobucci indicates that oppressive circumstances could overcome the suspect's will, making persuasion easier. Similarly, intense and prolonged questioning may cause an innocent suspect to feel they will inevitably be found guilty, making a promise of leniency more appealing.

[26] Defence counsel has provided two relevant cases. In *R. v. Bird (Man C.A.)*, [1989] M.J. No. 374, the court held that the interrogating officer had induced the suspect to confess with an offer to help him. Although this case has been addressed in some seventeen other decisions, all of those occur prior to the Supreme Court of Canada decision in *Oickle*. It therefore appears that the reasoning in *Oickle* supersedes that of *Bird*.

[27] The second case provided by defence counsel is *R. v. S.L.S.*, [1999] A.J. No. 69 (C.A.). This case stands for the principle that neither an invitation to tell the truth nor an entreaty to seek help for aberrant behaviours is an inducement that could be considered coercion. However, comments from a person in authority that go beyond such an invitation or entreaty may give rise to an involuntary statement. In light of *R. v. Millar*, [2003] A.J. No. 635 (Q.B.) and *R. v. Bruha*, [2003] N.W.T.J. No. 47 (S.C.), it appears this concept has survived *Oickle* and remains part of the law.

Findings

[28] Although I will discuss the admissibility of Mr. Linklater's statements to the police under the categories of oppression or "operating mind", coercion or improper inducement and persuasion, I am mindful that these are not separate categories existing in isolation and that in most instances they are interrelated. I will consider all of the circumstances surrounding the confession in considering whether it was voluntary.

[29] Persuasion, as described by the Supreme Court of Canada in *Oickle*, is not an operating factor on the facts of this case. It was not argued that the police, through their actions, persuaded Mr. Linklater, an innocent suspect, that he did in fact commit the offences before the Court. There is nothing in the transcript of the interview to suggest even the possibility of a subconscious reconstruction of Mr. Linklater's memory through police questioning. As a result, I will not deal with this

category of police action resulting in a statement to the police being held to be involuntary.

[30] Submissions on oppression were made by the defence based on Mr. Linklater's comments that he had been "doing crack and cocaine" a day earlier and that he had not had any sleep for a few days (pages 39, 41 and 45).

[31] After Mr. Linklater's arrest at 8:30 p.m. and before his interview with Constable Phillips at 2:30 a.m., Mr. Linklater had an opportunity to sleep, although it is not clear how much sleep he had had. He was awake when taken out of his cell to the interview. That is to say, he was not awoken for the interview. When asked whether he was going through withdrawal during the interview, he replied that he wasn't (page 23). Both officers who dealt with him after his arrest indicated that Mr. Linklater appeared sober.

[32] Mr. Linklater's interaction with Constable Lagimodierre and Constable Phillips indicate clearly that he was mentally alert, responsive to questions and his environment and functioning with an "operating mind" independent of the police.

[33] When Constable Lagimodierre approached Mr. Linklater initially, he obviously appreciated that he would be arrested if he gave his own name, so he put forward the false name "Nevada Vance". When in police custody, and asked why the female on the street had called him "Ricky", he recognized that his masquerade was fruitless and replied, "you got me, I'm Ricky Linklater". When asked why he had given the false name, his response was that he wanted to party that night, meaning he wanted to avoid arrest. These interactions are normal and demonstrate that he was fully aware of his situation. He was responding and functioning independent of the police.

[34] At the detachment, Mr. Linklater was asked if he wanted to speak to a lawyer. His response, in my view, demonstrates rational and independent thinking: He said that he would wait until he saw what happened with the parole warrant. Shortly after 10:30 p.m., he spoke to a lawyer. He advised the police that he was satisfied with the advice he had received.

[35] Although the interview itself was lengthy, over one hour, a review of the transcript shows that it did not involve controlled, directed and aggressive questioning of Mr. Linklater. At no time did Mr. Linklater indicate that he wanted the interview to end, although he initially refused to talk about the robbery itself. At no time did he ask for food, water, clothing or anything else that might indicate any degree of physical or emotional stress. I am satisfied that the interview environment was not oppressive.

[36] Unlike the accused in *R. v. Hoilett* (1999), 136 C.C.C. (3d) 49, Mr. Linklater was not under the influence of cocaine or alcohol, his clothing had not been removed, he did not complain of being cold and he did not fall asleep during the interrogation. In that case, Mr. Hoilett testified that he hoped that if he talked to the police they could give him warm clothes and cease the interrogation.

[37] In *Oickle*, Iacobucci, J. identifies some of the factors that create an atmosphere of oppression, such as deprivation of food, clothing, water, sleep or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time. None of these factors are present in the case at bar.

[38] The Court in *Oickle* also recognizes that the use of false or fabricated evidence, combined with other oppressive factors could result in an involuntary confession. In this case, Constable Phillips did not fabricate any evidence, although she may have exaggerated its importance. As a result of the photo line

up I am satisfied that Constable Phillips honestly believed that the evidence available to the police was sufficient to convict Mr. Linklater of the robbery charge. This evidence, in my view, was a significant factor in persuading Mr. Linklater to admit his involvement. But in my view, Constable Phillips was entitled to use this evidence in the way that she did.

[39] Threats, promises or other inducements can also render a confession involuntary. On the facts, there is no suggestion that Mr. Linklater was threatened in any way. But it is improper for the police to suggest to a suspect that he or she will take steps to procure a reduced charge or sentence if the suspect confesses. A suspect who is convinced by fabricated police evidence or oppressive questioning that no one will believe his protestations, may be susceptible to accepting an offer of lenient treatment in return for a confession. Further, police suggestions that “it would be better if you confessed” could amount to an inducement of promise of favour or benefit and would be closely scrutinized with a view to exclusion. On the other hand, phrases such as “it would be better if you told the truth” or appealing to a suspect’s concept of right or wrong, will not automatically require exclusion. The context of the confession should be examined and the judge must determine whether there is a reasonable doubt that the resulting confession was involuntary. Finally, moral or spiritual inducements, or appeals to the suspect’s conscience will generally not result in an involuntary confession, absent any other improper conduct, because the inducement offered is not within the control of the police officer.

[40] I have reviewed the statements as a whole as well as the excerpts identified by the defence on pages 34 and 39. I have considerable difficulty finding that these exchanges are even capable of being interpreted or understood as inducements or promises. There is no doubt in my mind that they were not perceived by Mr. Linklater as such. Moreover, before Mr. Linklater admits any involvement with the robbery, Constable Phillips clearly tells him that she is not in any position to make any deals (see para. 9 above). Nevertheless,

he does eventually admit to his involvement in the robbery (pages 39 to 52). In my opinion, he did so of his own accord and in the absence of any improper inducements by the police.

[41] When Constable Phillips changes the topic to the attempted robbery of Riverside Grocery, Mr. Linklater raises the possibility of a deal (pages 53 to 55). In other words, he is “fishing” for a deal as a condition of talking to Constable Phillips about this other charge. There is nothing in the statement or the evidence prior to this point to suggest that the police had said or done anything to lead him to believe they would be open to a deal. Constable Phillips responds to this “fishing expedition” by Mr. Linklater by stating that she is not prepared to consider any deals at this time as part of this statement. The discussion continues and Mr. Linklater provides incriminating answers with regard to the Riverside Grocery attempted robbery.

Conclusion

[42] Unlike the facts in *Oickle*, there is almost nothing in the evidence before me that is capable of impacting negatively on the voluntariness of Mr. Linklater’s statement to the police. Mr. Linklater was never mistreated, he was questioned in a very friendly, conversational mode and he was not offered any inducements. Prior to the interview, he had accessed legal counsel. At the beginning of the interview, he was given his legal rights, including his right to remain silent – for the third time after this arrest. During the interview, prior to Mr. Linklater making any incriminating statements about the robbery of the Roadhouse Off Sales-Liquor Outlet, Constable Phillips tells him that she is not in a position to make any deals. She does so again prior to Mr. Linklater responding to her questions about the attempted robbery of the Riverside Grocery. While Mr. Linklater may have been on drugs for several days prior to his arrest and may have had little sleep for several days, the evidence clearly establishes that at the time of the interview he was sober, not undergoing drug withdrawal and not suffering from sleep deprivation.

[43] In these circumstances, I am satisfied beyond a reasonable doubt that Mr. Linklater's statement to the police was voluntary. The statement is admissible.

Lilles C.J.T.C.