

Citation: *R. v. Turner*, 2010 YKTC 60

Date: 20100610
Docket: 09-10081
Registry: Watson Lake

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

REGINA

v.

DEAN TURNER

Appearances:
Mark Pindera
Keith Parkkari

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] FAULKNER T.C.J. (Oral): Dean Turner is charged with two offences contrary to the *Wildlife Act*, R.S.Y. 2002, c. 229.

[2] Count 1 alleges that he did on or about the 29th day of October 2009, at or near kilometre 1032 of the Alaska Highway, Yukon Territory, being a person who wounded wildlife while hunting it, fail to make reasonable effort to kill it, contrary to s. 28 of the *Wildlife Act*.

[3] Count 2 alleges that he did on the 29th day of October 2009, at or near kilometre 1032 of the Alaska Highway, Yukon Territory, being a person in possession of a firearm for the purpose of hunting, discharge a firearm without due care and

attention or without reasonable consideration of people or property, contrary to s. 10(1) of the *Wildlife Act*.

[4] On October 29, 2009, Mr. Turner was hunting caribou near kilometre 1032 of the Alaska Highway, west of Watson Lake, in Yukon Territory. Around eleven o'clock in the morning, he drove past a point where Conservation Officer McLean was stopped at the side of the road. Officer McLean was talking to another hunter, named Lyndon Morrison. Just after Mr. Turner's truck passed the Conservation Officer's vehicle, Mr. Turner saw a group of caribou in the bush, just north of the Alaska Highway. He pulled over, stopped, and got out of the vehicle.

[5] At this point, I find that he was approximately 100 metres west of the Conservation Officer's vehicle. I note that Mr. Turner and his companion gave an estimate closer to 300 metres, but I prefer the evidence of the Conservation Officer in this regard. In any event, nothing turns upon the exact distance between the two vehicles. After Mr. Turner got out of the vehicle, he quickly chambered a round in his rifle, stood on the driver's side of his truck, leaned over the hood to steady the rifle and fired one shot at a bull caribou.

[6] The shot was observed by Constable McLean and Mr. Morrison, who were located along the shoulder of the highway in close proximity to their vehicles. Conservation Officer McLean believed that Mr. Turner was on the travelled portion of the roadway when he discharged the rifle.

[7] Mr. Turner, for his part, believed that his shot had missed the caribou but he went into the bush to investigate. He did not see the animal and saw no blood. After some

minutes, he returned to his truck. Barry Drury, who was a passenger in the accused's truck, also got out and had a look around in the area where the caribou had been. Meanwhile, Mr. Drury's wife arrived in another vehicle and she also walked in the bush to investigate.

[8] After Mr. Turner returned to his truck, Conservation Officer McLean spoke to Mr. Turner and ultimately issued him a warning ticket for breaching s. 10(1) of the *Wildlife Act* on the basis that Mr. Turner had fired a shot at the caribou from the travelled portion of the roadway. Mr. Turner then left the scene.

[9] Soon afterward, Conservation Officer Brodhagen arrived and after a discussion with Conservation Officer McLean, the pair decided to go into the bush and investigate further. The two conservation officers followed the defendant's tracks in the snow into a cut block area, approximately 100 to 150 metres from the highway, where it was obvious from the tracks that Mr. Turner had turned around. Proceeding another 50 yards or so, the two conservation officers saw blood on the ground and a short distance away, saw the caribou, which Mr. Turner, as it turned out, had shot in the gut. The caribou was badly injured, not expected to survive and was dispatched by the conservation officer.

[10] Having now seen the result of Mr. Turner's hunt, Conservation Officer McLean located Mr. Turner and issued tickets for the two offences now before the Court.

[11] With respect to Count 2, which I will deal with first, a hunter is considered to have acted without due care and attention or without reasonable consideration of people and property, when, amongst other things, he discharges a firearm on or across the

travelled portion of a road that is normally used by the public, whether or not the safety of any persons was actually in danger.

[12] The first issue, then, is to determine the defendant's location when he fired the shot at the caribou. According to Conservation Officer McLean, Mr. Turner was on the roadway in the westbound lane when he fired the shot. Mr. Turner, for his part, maintains that he was on the shoulder of the road. The Alaska Highway is paved at this point and has a centre yellow line or lines and has additional white lines marking the paved shoulders of the road. It had been snowing on October 29th and neither the white line nor the yellow lines could be seen.

[13] Officer McLean took photos of the defendant's truck as it was still parked at the scene at this time. They clearly show that the defendant's truck was parked on the right hand side of the road, heading westbound. There are numerous tracks indicating where vehicles had been driving in the westbound lane, most of these tracks appear to end between 12 and 18 inches to the south of the driver's side of the defendant's vehicle, but there is also at least one other set of tracks several feet to the north of the driver side of the defendant's truck. Conservation Officer McLean could not locate the white line painted on the road because of the fact that the road was covered with packed snow. As I have said, Conservation Officer McLean photographed the accused's truck when it was still parked at exactly the point from which Mr. Turner had leaned on the hood and taken his shot.

[14] Mr. Turner made no additional observations of where his location had been at that particular point in time, but he did return to the scene some four or four and a half hours after the incident. He parked in what he thought was the same spot. Using

water, the defendant and Mr. Drury melted snow on the road until they located the white line and the centre line of the road. Additionally Mr. Turner took photos. Based on the photos he took, it appears that the white line was approximately 18 inches south of the driver's side of the defendant's vehicle.

[15] Now, I should say that it is unlikely that when Mr. Turner took the photos and made the measurements that he did, that he was parked in exactly the same spot as when he fired the shot. Some hours had passed and snow had continued to fall. There were numerous additional tire tracks on the road. Moreover, the defendant's footprints, which Conservation Officer McLean viewed and which clearly show in Conservation Officer McLean's photos, cannot be seen in the defendant's photos. However, even assuming that the defendant was parked in the same spot as when he shot the caribou, I have no hesitation in finding that although the defendant's vehicle may have been on the shoulder of the road, Mr. Turner himself was at least partially in the westbound lane when he fired the shot.

[16] As indicated, the defendant's truck was at best approximately 18 inches north of the shoulder line. The defendant got out of his truck and stood near the front quarter panel and leaned over the hood to take his shot. Unless he had both feet almost touching the front tire, he would not have been over the white line. Conservation Officer McLean's photos show the defendant's footprints and one of them nearly spans the distance between the defendant's truck and the obviously travelled portion of the roadway, which is approximately the same distance as the defendant claims between his truck and the white line. As well, Constable McLean's photos show Mr. Turner's prints and they are at least partially on the roadway.

[17] In any event, if I am wrong in finding that the exact location of the defendant when he took the shot, in my view, the defendant was nevertheless clearly in the travelled portion of the roadway. Even if he was in fact slightly over the white line toward the roadway's edge. As stated, the white line could not be seen but was covered in snow. However, the tire tracks from vehicles travelling along the Alaska Highway can be seen and they do extend north of the driver's side of the defendant's vehicle.

[18] In my view, in winter conditions, the travelled portion of the roadway must include at least that portion of the roadway that vehicles are actually using, notwithstanding that they may actually end up slightly over painted but invisible lines on the roadway itself.

[19] There is the additional matter of the decision of Judge Lilles in *R. v. Allen* (2 November 1987), Yukon 87-2822-01/02 (Yukon Terr. Ct.). Judge Lilles held that the travelled portion of the roadway does not extend to the paved shoulder of the road. Although it is strictly not necessary to decide in this case, with respect, I find that I must disagree with the decision of Judge Lilles in this regard. In my view, the travelled portion of a roadway includes the shoulder. Bicycles and pedestrians customarily travel along the shoulder and other vehicles use the shoulder not only to pull over and stop but also when travelling slowly or to let faster traffic go by. I note as well the definition of roadway relied upon by Judge Lilles is no longer contained in the *Highways Act*, R.S.Y. 2002, c.108.

[20] In any event, as I say, in my view, it is wrong to make an artificial distinction between the actual lanes of the road and the paved shoulder because they are customarily used by vehicles and by members of the public. It would be absurd, in my

view, to deem a shooter standing one inch toward the centre of the roadway from the white line to be acting negligently when, if the same person was to stand one inch to the outside of the line, he would be acting properly and lawfully. The danger which the statute seeks to alleviate is the danger of firearms being discharged on roadways and the inherent danger is identical in both of the cases that I have put forward as hypotheticals.

[21] Moreover, in this particular case and on the facts, there may be other reasons to find that the defendant's actions were imprudent and unlawful. The Alaska Highway is a busy road and there was considerable traffic on it, as indicated by the conservation officers in their evidence. As well, there is the fact that the defendant had seen two vehicles stopped nearby. He saw no persons, but took no particular steps to ascertain where these people might be located. He simply stopped, got out and fired within a period of seconds.

[22] In the result, I find Count 2 has been proved. The defendant, in my finding, was over the white line of the road and indeed took no real steps at the time he was shooting to ascertain where the line was. Even if he was not over the line, in my view he was very close to it and for the reasons I have already indicated, the presumption still applies.

[23] With respect to Count 1, it is clear the defendant had an obligation to take reasonable steps to kill the animal that he had wounded. After he fired the shot, Mr. Turner believed that he had missed, but he did quite properly go into the bush and take a look around for some time to see what he could find. In addition, he was assisted by Mr. and Mrs. Drury. However, it is obvious in this case that it took little additional effort

to what the accused and his companions had done in order for the conservation officers to discover that the caribou was mortally injured and dispatch it. Consequently, I find that the defendant's efforts fell somewhat short of what was reasonable in the circumstances.

[24] That is not the end of the matter, however. As the defendant was in the bush looking for the animal or signs of blood, he noticed that Conservation Officer McLean had pulled in behind the accused's truck and that the emergency lights on the Conservation Officer's truck were flashing. Not unreasonably, he concluded that he was under investigation and returned to the road. He told the conservation officer that he believed that he had missed the caribou.

[25] The discussion then turned to the business of shooting from the road. As previously indicated at that time, Constable McLean gave the defendant a warning ticket and told him he could leave. Significantly, however, he did not suggest any further search for the caribou be carried out. Mr. Turner, for his part, testified that he would normally have gone back and searched further but that he did not do so because the conservation officer had told him that he could leave and that he felt in the circumstances this would be the most prudent course. I suspect most people would have felt the same. Moreover, the apparent lack of concern on the part of the conservation officer as to any further search for the caribou would, in my view, have contributed to the defendant's belief that he had fulfilled his obligations.

[26] In these somewhat singular circumstances, I find that the defendant has established on balance that his actions in regard to searching for the wounded caribou were reasonable. Consequently, Count 1 is dismissed.

FAULKNER T.C.J.