

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ANTHONY PIDBOROCHYNSKI

- and -

FELICIA PIERROT

RULING ON VOIR DIRE

[1] Anthony Pidborochynski and Felicia Pierrot were charged with possession of cocaine for the purpose of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act*. On September 5, 2017, in advance of their jury trial scheduled for October 2, 2017, a *voir dire* was held in relation to statements made by Mr. Pidborochynski and Ms. Pierrot to the police. The issue on the *voir dire* was voluntariness. Neither accused brought an application alleging that any of their rights under the *Canadian Charter of Rights and Freedoms* were infringed.

[2] The Crown called Cpl. James Lai, Cst. Kevin Sales, Cst. Tina Platford (formerly known as Tina Acreman¹) and Cst. William Sturgeon as witnesses on the *voir dire*. The videotaped statement of each of the accused was also viewed. The

¹ While witnesses referred to her as Cst. Platford and/or Cst. Acreman in their evidence, I will refer to the officer as Cst. Platford throughout the decision for clarity.

DVDs of the statements were made an exhibit as was an Agreed Statement of Facts.

[3] On September 8, 2017, I ruled that neither statement was voluntary indicating that full reasons would be provided. These are those reasons.

BACKGROUND

[4] On November 30, 2015, the Royal Canadian Mounted Police obtained a search warrant for apartment 407 at Fort Gary Apartments in Yellowknife, Northwest Territories. The police had obtained information that individuals at the apartment were trafficking in cocaine. Cpl. Lai, Cst. Sales, Cst. Platford and Cst. Sturgeon were involved in the execution of the search warrant and arrest of Felicia Pierrot. Later, Cst. Platford took a statement from Felicia Pierrot and Cst. Sturgeon took a statement from Anthony Pidborochynski.

[5] At approximately 3:30 p.m., members of the R.C.M.P. made their way to apartment 407 in Fort Gary Apartments. Cpl. Lai was part of the warrant execution team at the door of the apartment. Cpl. Lai testified that he knocked on the door and waited some time before the door was eventually answered by Felicia Pierrot. Cpl. Lai pulled her out of the apartment and advised her that she was under arrest for "PPT". Once he did so, Cpl. Lai testified that he passed Ms. Pierrot behind him into the custody of another officer, he believed it was Cst. Platford, before entering the apartment. Two other males were also in the apartment and the search revealed a duffel bag which contained items consistent with drug trafficking as well as 800 grams of cocaine. Cpl. Lai's contact with Ms. Pierrot was brief and he had no further interactions with her.

[6] Cst. Kevin Sales was involved in observing apartment 407 prior to the execution of the warrant and assisted in the execution of the warrant. He observed Cp. Lai knock on the door and that there was no answer. Cst. Sales testified that Cpl. Lai knocked again and he observed Felicia Pierrot open the door. Cst. Sales stated that Cpl. Lai passed Ms. Pierrot to him at 3:28 p.m. and he advised her that she was under arrest for the possession of cocaine. He then passed her off to Cst. Platford before entering the apartment. Shortly after this, he assisted Cst. Sturgeon in escorting Ms. Pierrot to the police vehicle before returning to the apartment to assist in the search. While doing so, he did not have any further communication with Ms. Pierrot.

[7] Neither Cpl. Lai nor Cst. Sales could remember if firearms were drawn when initially dealing with Ms. Pierrot.

[8] Cst. Platford was present when the police entered the apartment. Her role was to assist and watch the hallway for members' safety. She was with Cst. Sales and observed the arrest of Felicia Pierrot by Cst. Sales. Cst. Platford recalled that Cst. Sales told Ms. Pierrot that she was under arrest but could not recall the words or Ms. Pierrot's response. Cst. Platford asked Felicia Pierrot if she was okay and then searched her in the hallway of the apartment building. Cst. Platford then assisted in escorting Ms. Pierrot to the police vehicle with Cst. Sales. Cst. Sturgeon was also present. Cst. Platford took a statement from Felicia Pierrot later that evening, shortly after 9:00 p.m.

[9] Cst. Sturgeon was present with Cpl. Lai when he knocked on the door to the apartment. He observed Cpl. Lai remove Felicia Pierrot from the apartment and arrest her before he went into the apartment. He returned to the hallway of the apartment building and took custody of Ms. Pierrot and placed her under arrest for trafficking. He then escorted Ms. Pierrot to the police vehicle and placed her inside. Cst. Sturgeon advised Ms. Pierrot that she was under arrest for trafficking, read her the *Charter* rights and police caution from a prepared card. He testified that she said she understood her rights and asked to speak to a lawyer. He then drove Ms. Pierrot to the R.C.M.P. detachment and processed her. Ms. Pierrot was given an opportunity to speak to a lawyer and she spoke to a legal aid lawyer for 3-4 minutes. Following this, she was lodged into cells. Cst. Sturgeon had no further contact with Ms. Pierrot while she was in police custody.

[10] Anthony Pidborochynski was arrested sometime in the evening on November 30, 2015 at Fort Gary Apartments. The evidence of his arrest was dealt with by way of an Agreed Statement of Facts. Mr. Pidborochynski stated in the Agreed Statement of Facts that, prior to providing a statement to Cst. Sturgeon, no one made any promises, gave any incentives, made any threats or said or did anything to cause him fear with respect to making a statement. Cst. Sturgeon took a statement from Mr. Pidborochynski the following day.

ANALYSIS

[11] The Crown is required to prove beyond a reasonable doubt that the statement made by an accused person to a police officer or person in authority was voluntary: *R v Oickle*, [2000] 2 S.C.R. 3.

[12] The overriding concern in the criminal justice system is not to convict the innocent and because of this, a statement will not be admissible if it is made under circumstances that raise a reasonable doubt about the voluntariness of the statement. *Oickle, supra* at para. 68.

[13] A statement which is not voluntary is often unreliable. Assessing the voluntariness of a statement is a contextual exercise and is fact specific. It involves considering of a number of factors including whether the statement is the result of threats or promises by the police officer; whether the statement was taken in oppressive circumstances; whether the accused had an operating mind; or whether the statement was taken as a result of police trickery. *Oickle, supra*.

[14] The right to remain silent is an aspect of the voluntariness assessment. The common law recognized that a person does not have to answer when questioned by the police and has the right to remain silent. As stated in *H.M.T.Q. v Blackduck*, 2014 NWTSC 58 at para. 53:

The confessions rule serves to protect a detainee's exercise of free will in choosing whether to remain silent, and includes safeguards to ensure that the admission of the statement will not result in an unfair trial.

[15] The provision of rights and the police warning to individuals upon arrest or detention advises them of the reasons for their arrest, their rights to legal counsel and their right to remain silent. The exercise of these rights allows individuals to make an informed decision to choose whether to speak to the police or not. As I stated in *R v Carpenter*, 2016 NWTSC 30 at paras. 22-23:

[22] The police caution or warning given to individuals embodies this aspect of voluntariness. The police caution informs an individual, in plain language, of their right to remain silent. The common form of the police caution given to individuals, as stated in *Singh, supra* at para. 31 is:

You are charged with... Do you wish to say anything in answer to the charge? You are not obliged to say anything but whatever you do say may be given in evidence.

[23] The purpose of the caution was explained in *R v St. Germaine*, 2014 NWTSC 52 at para. 17-18:

The purpose of the caution is to make the person cautioned aware of the full implications of speaking to the police, which is an element of trial fairness. Without that awareness, whether it comes from the police or counsel, any statement obtained may be found not to have been truly voluntary. The presence of a caution is a factor in determining the voluntariness of a statement made by a person under arrest or detention and has been for over half a century: *R v Singh*, also referring to *Boudreau v The King*, [1949] S.C.R. 262. In many cases, it is an important factor.

[16] Voluntariness requires an awareness about what is at stake in choosing to speak to a police officer or declining to speak to a police officer: *St. Germaine, supra* at para. 18.

Statement of Felicia Pierrot

[17] In argument, defence counsel argued that voluntariness had not been established referring to: the arrest of Ms. Pierrot and that she was advised of three different reasons for arrest; that Ms. Pierrot spoke to someone that the police believed was a lawyer; and Cst. Platford took the statement from Ms. Pierrot without any further warnings or cautions, saying to Ms. Pierrot that they were going to have a chat.

[18] The Crown argues that while Ms. Pierrot was advised of several reasons for arrest, Cst. Sturgeon was the officer who advised her of the reason for arrest and provided her with her *Charter* rights and caution verbatim from a card. The provision of and acknowledgement of her rights are a key component to voluntariness. As a result, the statement made by Ms. Pierrot was voluntary.

[19] Once Ms. Pierrot answered the door to the apartment, she was removed by Cpl. Lai and placed under arrest. Cpl. Lai testified that he used the term “PPT” when placing Ms. Pierrot under arrest for “PPT”. Ms. Pierrot was then advised by Cst. Sales that she was under arrest for possession of cocaine. Cst. Sturgeon then placed Ms. Pierrot under arrest. Cst. Sturgeon testified that he placed Ms. Pierrot under arrest for “trafficking” and apparently did not specify the substance in which Ms. Pierrot was believed to have trafficked.

[20] Ms. Pierrot has not alleged a breach of her section 10(a) *Charter* rights but when considering whether a person has been informed of the reason for arrest or detention, it is not required that a person be advised of the specific charge against them so long as the accused person can reasonably be supposed to have understood

the basis for the investigation: *R v Lund*, 2008 ABCA 373. In this case, Ms. Pierrot must have understood that the police were conducting a *Controlled Drugs and Substances Act* investigation. In short, the police were investigating a drug offence.

[21] Simply because Ms. Pierrot must have understood the nature of the police investigation does not mean that the information provided to her by the different officers was not confusing. While Ms. Pierrot may have understood that PPT referred to possession of a controlled substance for the purpose of trafficking, that cannot be assumed. And there is a significant difference in being charged with possession of cocaine than with trafficking or possession for the purpose of trafficking. The jeopardy, upon conviction for the latter offences, is significantly different from that for possession. Lengthy terms of imprisonment are often imposed for trafficking and possession for the purpose of trafficking in cocaine. While Cst. Sturgeon was the last officer to advise Ms. Pierrot of her reason for arrest and that it was for trafficking (in an unnamed substance), it would not be surprising if Ms. Pierrot were confused about what charge she might be facing aside from it being a drug charge. When Cst. Platford began the interview with Ms. Pierrot, she did not say anything to Ms. Pierrot about the offence under investigation which could have resolved any confusion that Ms. Pierrot might have held about the charge she would be facing.

[22] Cst. Sturgeon provided Ms. Pierrot with her *Charter* rights and the police caution to which she indicated that she understood. Ms. Pierrot requested to speak to counsel and, once at the detachment, was given an opportunity to speak to counsel. Cst. Sturgeon called the legal aid duty number and Ms. Pierrot spoke with this person for 3-4 minutes. Cst. Sturgeon was questioned by defence counsel about how he knew it was a lawyer on the telephone. Cst. Sturgeon testified that he called the legal aid duty number, the person usually answered by saying he was Ron Dumonceaux but on this occasion, he could not recall if that was what occurred and he assumed that the person on the telephone was a lawyer. Mr. Dumonceaux is a lawyer whose name frequently arises as being the lawyer who detained or accused persons speak to when calling the legal aid duty number. The assertion that the person answering the legal aid duty number might not have been a lawyer, without any other evidence, is mere speculation. In the circumstances, I have no concerns that Ms. Pierrot exercised her right to speak to counsel following her arrest.

[23] Cst. Platford took a statement from Ms. Pierrot several hours later, at 9:11 p.m. Cst. Platford testified that she volunteered to speak to Ms. Pierrot because

she liked her from previous dealings and felt they were friendly with each other. She went to the detachment cells and said to Ms. Pierrot, "Let's go talk". She escorted Ms. Pierrot from cells and into an interview room. She did not formally arrest Ms. Pierrot or provide her with access to counsel, assuming that had been done as part of the booking procedure and officers had been assigned specific roles in the investigation including dealing with arrests. Cst. Platford proceeded to take a statement from Ms. Pierrot that was video and audio taped.

[24] Cst. Platford had volunteered to take the statement because of her rapport with Ms. Pierrot. She had dealt with Ms. Pierrot before and felt that they were friendly. As a result, the atmosphere in the interview room was casual and Cst. Platford asked questions, as occurred in *St. Germaine, supra* at para. 27, in "an atmosphere of a relaxed chat rather than a formal statement".

[25] Cst. Platford brought Ms. Pierrot into the interview room. At the beginning of the interview, Cst. Platford identified herself as a police officer and then asked Ms. Pierrot several questions:

Cst. Platford:	Okay? And you were arrested I think about what? Four?
Pierrot:	Yea, probably about that.
Cst. Platford:	Three, three-thirty, four?
Pierrot:	Yeah, cause then my sister (unclear)... herself out there.
Cst. Platford:	Did you get some supper?
Pierrot:	No, I wouldn't want to eat that.
Cst. Platford:	You feel hungry now?
Pierrot:	No.
Cst. Platford:	Okay. Well we can discuss that later. Just so you know, I know you've talken [sic] to other police officers.
Pierrot:	Mmm-hmm.
Cst. Platford:	Okay? And have you been, have been threatened in any way?
Pierrot:	Ahm, not really, I don't think so.
Cst. Platford:	No? Okay. And you've, nobody's offered you anything in exchange for information or...
Pierrot:	No.
Cst. Platford:	Okay. For telling anybody anything? Or...
Pierrot:	No.

Cst. Platford: So you, you're feeling okay right now? And like, you've, you're not feeling threatened in any way?

Pierrot: No.

[26] In this exchange, Cst. Platford asked Ms. Pierrot some questions which are covered in the secondary warning but did not tell Ms. Pierrot that she was taking a statement from her, that it was being audio and video recorded, and she did not provide her with the secondary police warning which is often done when taking statements from persons who have been arrested or detained. The failure to advise Ms. Pierrot of these things is not determinative and all of the circumstances have to be considered. Ms. Pierrot had been advised approximately 5 and a half hours earlier that she had the right to remain silent and that anything she said could be used against her, but there was little in the interview with Cst. Platford to signal to Ms. Pierrot that this was more than just a friendly chat.

[27] Ms. Pierrot answered the questions that Cst. Platford asked her, perhaps because she got along with the officer, but I am not satisfied that this demonstrates a real understanding on Ms. Pierrot's part that what she was saying was going to be used against her. The initial discussion, during the interview, is about the two other guys who were in the apartment with Ms. Pierrot before she was arrested. It is over half-way into the interview before there is any discussion of the results of the search warrant:

Cst. Platford: Well, it wasn't left a mess. We executed a search warrant on the residence today.

Pierrot: Yeah?

Cst. Platford: Do you, do you know what we would've found there?

Pierrot: What? No.

Cst. Platford: We found a lot of cocaine and crack.

Pierrot: What?

Cst. Platford: Yeah.

Pierrot: So then what now?

Cst. Platford: I don't know. Do you know anything about that?

Pierrot: No, I didn't know anything about that.

[28] It appears that the seriousness of the situation and what was at stake were not readily apparent to Ms. Pierrot when the interview began and she only began to

become aware as the interview progressed. As Justice Schuler stated in *St. Germaine, supra* at para. 37:

There is a risk, when a police interview is conducted in too friendly and casual a manner, and important matters like the police caution are not properly explained, that the seriousness of the situation and what is at stake will be significantly downplayed.

[29] Ms. Pierrot did not testify on the *voir dire* and there is no evidence as to her beliefs or understanding at the time of the interview with Cst. Platford. However, the concerns that I have referred to cause me to doubt whether the statement was voluntary when Ms. Pierrot spoke with Cst. Platford. While I have no doubt that Ms. Pierrot was advised on arrest that she did not have to speak to the police and indicated that she understood, I have a doubt, in the circumstances, whether Ms. Pierrot understood that she was giving a statement to the police that could be used against her. In all the circumstances, I have a reasonable doubt as to whether the statement was voluntary and, as such, I rule that the statement Ms. Pierrot gave to Cst. Platford is not admissible in evidence.

Statement of Anthony Pidborochynski

[30] Defence counsel has not argued that Mr. Pidborochynski's rights were violated but has argued that voluntariness requires an awareness of what is at stake and that the problem with the statement given by Mr. Pidborochynski is what was told to him by Cst. Sturgeon was confusing and that it would not have been clear to the accused what was at stake.

[31] The Crown's position is that Mr. Pidborochynski was given his rights and police caution upon arrest, exercised his right to counsel, was advised of his right to silence and that anything he said could be used in evidence, that he was alive to the jeopardy he faced and was aware of what was at stake. As such, voluntariness has been established.

[32] Although it is not clear from the Agreed Statement of Facts, Mr. Pidborochynski was apparently arrested for possession for the purpose of trafficking in cocaine by either Cst. Hipolito or Cst. De Grandpre who dealt with him on his arrest. There is no indication that, upon arrest, he was provided his *Charter* rights or police caution or that he understood them.

[33] Mr. Pidborochynski was asked at 11:55 p.m. if he wanted to speak to a lawyer. He asked to speak to legal aid. There was an unsuccessful attempt to contact legal aid. At approximately 1:05 a.m. on December 1, 2015, Mr. Pidborochynski spoke with a legal aid lawyer for approximately 6 minutes. It is not clear when the first attempt to contact legal counsel was made and, aside from the unsuccessful first attempt, no explanation was provided for the delay between 11:55 p.m. and 1:05 a.m. in Mr. Pidborochynski speaking with a lawyer.

[34] Cst. Sturgeon testified that he went to the detachment cells the next day at 9:50 a.m. to speak to Anthony Pidborochynski. Cst. Sturgeon advised Mr. Pidborochynski that he was charged with trafficking, asked if he wished to speak to a lawyer and advised him of the secondary caution. Mr. Pidborochynski indicated that he understood and did not wish to speak to a lawyer. Cst. Sturgeon brought Mr. Pidborochynski to an interview room and took a statement from him.

[35] It's not clear why Cst. Sturgeon advised Mr. Pidborochynski of his reason for arrest, asked if he wished to speak to a lawyer and advised him of the secondary caution at the cell block in the detachment and not in the interview room where it would have been audio and video-recorded and Mr. Pidborochynski's acknowledgement and understanding of his rights would also be recorded. While I have no doubt that it occurred as Cst. Sturgeon testified, I am concerned about Mr. Pidborochynski's understanding of what occurred based on how the interview began.

[36] At the beginning of the interview, Cst. Sturgeon advised Mr. Pidborochynski that the statement was audio and video-recorded then went on to say:

Ahm, so I just ah, advised you ah, when I went and got you in your cells ah, of your outstanding arrest and why you, why you were arrested. Possession for the purpose of trafficking cocaine. Okay? Ahm, you will be charged for those offences. Okay? Those are ahm, those are the charges that you, you're going to be facing. Okay? Ahm, I also advise you that anything you said to me or any other person in authority can be used as evidence in court. Okay? I also advise you of ah, to what's called a secondary police caution. So basically what that is, is even if another officer said something to you, promised you anything or threatened you ahm, that's, there's, that's off the table. Like there's no, I'm not going to threaten you. I'm not here to ah, basically trick you in, in any way, form or another. Basically we're here to find the truth and what's going on. That is why you're talking to me. I did give you an opportunity to speak to a lawyer. You declined. Ahm, and basically ah, it's important that you understand your rights and I'm glad that you understood them. Seems to me that you understood them. But if you don't understand them I can read them again to you. Okay? Ahm, you also advise me you had court today.

[37] Cst. Sturgeon does not wait for a response each time he asks “okay?” before continuing talking to Mr. Pidborochynski. During this recitation, there is no reply from Mr. Pidborochynski and he doesn’t appear to be indicating his agreement or disagreement with the questions that Cst. Sturgeon asks. Mr. Pidborochynski does not indicate that he understood his rights. It is only when Cst. Sturgeon mentions that Mr. Pidborochynski had court that Mr. Pidborochynski responds and says “yep”.

[38] It is not clear what was said to Mr. Pidborochynski on arrest or what his response was to any of the questions usually put to an accused upon arrest: i.e. Do you understand the reason for arrest? The right to counsel? Do you wish to speak to counsel? Considering this and his non-responsiveness to what Cst. Sturgeon says to him at the beginning of the interview causes me some concern about Mr. Pidborochynski’s understanding of his rights and his awareness of what is at stake.

[39] Following this exchange, Cst. Sturgeon asks Mr. Pidborochynski about being in the hospital:

Cst. Sturgeon: Ahm, my name’s Will. Call me Will. Ahm, and obviously I’m an RCMP officer here in Yellowknife. So, you in the hospital?

Pidborochynski: Yeah, it, yesterday.

Cst. Sturgeon: Oh, you were in, was it like a day thing? Or were you...

Pidborochynski: Yes, I was in the hospital when all of this occurred, I guess.

Cst. Sturgeon: Okay, so when you, you didn’t know what was happening at your...

Pidborochynski: No.

[40] There were no further questions asked of Mr. Pidborochynski about why he was in the hospital, his medical condition or whether he was capable of providing a statement. Mr. Pidborochynski did not make any complaints about how he was feeling but it would have been prudent to ensure that Mr. Pidborochynski’s medical condition was such that he could provide a statement to the police.

[41] Cst. Sturgeon proceeded to ask a number of questions and Mr. Pidborochynski answered the questions that were asked. It’s apparent from the initial question and answers that Mr. Pidborochynski was confused about what had happened. He told Cst. Sturgeon that he had returned to his apartment and it was

trashed and he did not know what was going on. Cst. Sturgeon tells Mr. Pidborochynski that his job is to figure out “who is who and names and who owns what”. Based on that and Cst. Sturgeon earlier telling Mr. Pidborochynski that they were there to “find the truth and what’s going on”, it could cause a person to be confused about what was at stake in speaking with the officer. Mr. Pidborochynski could have thought they were they talking about an incident that occurred and trying to figure out what happened without realizing what was at stake and that what he said to Cst. Sturgeon could be used in evidence against him.

[42] Ultimately, Mr. Pidborochynski did not testify on the *voir dire* and there is no evidence as to his beliefs or understanding at the time of the interview with Cst. Sturgeon. However, the concerns that I have referred to cause me to have a doubt whether the statement was voluntary when the accused spoke with Cst. Sturgeon. While I have no doubt that Mr. Pidborochynski was advised that he did not have to speak to the police and indicated that he understood, I have a doubt, in the circumstances, whether Mr. Pidborochynski was aware of what was at stake and understood that he was giving a statement to the police that could be used against him. In all the circumstances, I have a reasonable doubt as to whether the statement was voluntary and, as such, I rule that the statement Mr. Pidborochynski gave to Cst. Sturgeon is not admissible in evidence.

[43] For these reasons, I concluded that neither Ms. Pierrot’s nor Mr. Pidborochynski’s statement was voluntary.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
25th day of January, 2018

Counsel for the Crown :
Counsel for the Accused Pidborochynski :
Counsel for the Accused Pierrot :

Morgan Fane
Peter Harte
Jay Bran

S-1-CR-2016-000067

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN

HER MAJESTY THE QUEEN

- and -

ANTHONY PIDBOROCHYNSKI

- and -

FELICIA PIERROT

RULING ON VOIR DIRE
OF
THE HONOURABLE JUSTICE S.H. SMALLWOOD
