IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

Vance NARCISSE

REASONS FOR DECISION
of the
HONOURABLE JUDGE B. E. SCHMALTZ

Heard at:	Fort Smith, Northwest Territories April 29, 2009
Reasons given:	June 23, 2009
Reasons filed:	June 26, 2009
Counsel for the Crown:	Jill Andrew
Counsel for the Defendant:	Steve Shabala

(Charged under s. 253 (1) (a) and s. 249 (1) *Criminal Code*)

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I. INTRODUCTION

[1] Vance Narcisse is charged with operating a motor vehicle while impaired and with dangerous operation of a motor vehicle. Mr. Narcisse's trial proceeded in Fort Smith on April 29, 2009; the Crown called three witnesses, Gina Mercredi, Cst. Staudinger, and Cst. Wassill. No evidence was called on behalf of Mr. Narcisse. At the conclusion of evidence and submissions I reserved my decision.

II. EVIDENCE

Gina Mercredi

[2] Sometime in the morning of August 23, 2008, 15 year old Gina Mercredi was picked up at her house by Vance Narcisse and Clayton Waniandy. Clayton Waniandy had a green van and drove them down to the boat launch where they met up with Samantha Bourke (Desjarlais) and Felix Beaver. Ms. Mercredi described Mr. Narcisse's condition as "drunk" when she was picked up. At the boat launch all five drank for an hour or more and then decided to go for a ride in the van.

[3] Upon leaving the boat launch, Mr. Narcisse drove; Ms. Mercredi was in the front passenger seat, Mr. Waniandy was behind Ms. Mercredi in the middle seat of the van,

and Mr. Beaver and Ms. Bourke were in the very back of the van on the floor, presumably passed out. Mr. Narcisse drove around Fort Smith. Ms. Mercredi described Mr. Narcisse as "drunk" and his driving as "pretty rough" and "driving all over the road", he was going "in the ditches and everything", he was driving fast, and as she said "you can tell he was drunk."

[4] After about a half an hour of driving around town, Ms. Mercredi noticed that the RCMP were following the vehicle. When the RCMP began following the van, Mr. Narcisse began to drive faster; Ms. Mercredi was telling him to stop, but he did not, and went on to the highway; the RCMP vehicle continued to follow the van with its siren and flashing lights operating. Ms. Mercredi testified that on the highway, Mr. Narcisse's driving was "still pretty drunk driving"; she thought the van had a flat tire as it was "going everywhere". At this time, the way Mr. Narcisse was driving made Ms. Mercredi feel very scared.

[5] While driving on the highway, Mr. Narcisse told Ms. Mercredi to get in the driver's seat as she would not be charged being underage, and he would pay the fine. Presumably Mr. Narcisse meant that she would not be charged with a criminal offence, but only with driving without a license, and would only be fined. Ms. Mercredi told Mr. Narcisse "no", but Mr. Narcisse persisted with this request telling Ms. Mercredi to "hurry up". Mr. Narcisse then went into the back of the van and sat beside Mr. Waniandy behind the driver's seat. No one was then in the driver's seat, though the van was still proceeding down the highway. At this point the van started going into the ditch, and Ms. Mercredi reached over and turned the steering wheel to attempt to straighten the van out, and also reached down and pressed the brake with her hand, and the van slowly came to a stop, on the wrong side of the road, and partly in the ditch.

<u>Csts. Staudinger & Wassill</u>

[6] On August 23, 2008, two complaints were made to the Fort Smith RCMP detachment of a green van with a possible impaired or intoxicated driver. Sometime

before noon, both Cst. Staudinger and Cst. Wassill, in separate police vehicles were driving around Fort Smith looking for the green van. Cst. Staudinger saw a green van and observed it go through a stop sign without stopping, and he began to follow the van. While following the van, Cst. Staudinger saw it proceed through another stop sign without stopping and onto the highway. Cst. Staudinger then accelerated to attempt to catch up with the van, at which point the van also accelerated at a high rate of speed away from Cst. Staudinger. Cst. Staudinger eventually caught up to the van, and while following it with his emergency equipment activated noted the van swerve a few times into the oncoming lane of traffic, before it finally came to a rolling stop on the wrong side of the highway at least partially in the ditch.

[7] When the van came to a stop, Cst. Staudinger was the first officer on the scene but waited for his partner Cst Wassill, who arrived very shortly after (less than a minute), and it was Cst. Wassill who approached the driver's side of the van. When the officers approached the van, no one was in the driver's seat.

[8] When Cst. Staudinger arrested Vance Narcisse, he noted signs of intoxication including the smell of liquor, red bloodshot glossy eyes, and a staggered walk. Cst. Wassill also noted that Vance Narcisse had bloodshot eyes and an odor of liquor on his breath.

III. <u>ISSUES</u>

A. Was Vance Narcisse's ability to operate a motor vehicle impaired by alcohol?

B. Did Vance Narcisse have the mens rea necessary to sustain a conviction for dangerous driving?

C. Can Vance Narcisse be convicted of both driving while his ability to operate a motor vehicle was impaired and dangerous operation of a motor vehicle, or does the *Kienapple* principle apply?

IV. ANALYSIS

Was Vance Narcisse's ability to operate a motor vehicle impaired by alcohol?

[9] Ms. Mercredi testified that she was sleeping when Mr. Waniandy and Mr. Narcisse arrived at her house to pick her up on the day in question, but she had been drinking prior to that. Further she continued to drink at the boat launch. Ms. Mercredi testified in a straight forward manner, she did not appear to exaggerate or minimize her evidence, and she had a fairly good recollection of what happened. Further, Ms. Mercredi's evidence was corroborated to some degree by Cst. Staudinger's evidence relating to how and where the vehicle was being driven while he observed it. Ms. Mercredi was not cross examined about her recollection of how Mr. Narcisse was driving. I take into account that Ms. Mercredi was under the influence of alcohol at the time that Mr. Narcisse was driving the vehicle but I accept her recollection of what happened that morning. I find her evidence relating to the manner in which Mr. Narcisse was driving to be both credible and reliable.

[10] Ms. Mercredi described Mr. Narcisse as "drunk" and his driving as "pretty rough" and "driving all over the road", going "in the ditches and everything"; he was driving fast. When the RCMP began following the van, Mr. Narcisse began to drive faster. Ms. Mercredi testified that on the highway, Mr. Narcisse's driving was "still pretty drunk driving" and he was "going everywhere". The way Mr. Narcisse was driving made Ms. Mercredi feel very scared.

[11] Based on Ms. Mercredi's description both of Mr. Narcisse's condition and of his driving, on Cst. Staudinger's observations of the driving during the time that he saw the van, and on both Cst. Staudinger's and Cst. Wassill's observations of the condition of Mr. Narcisse when each of them dealt with him, I find the evidence overwhelming that Vance Narcisse's ability to operate a motor vehicle was impaired by alcohol.

Mens rea for dangerous driving

[12] Vance Narcisse's actions in abandoning the driver's seat of the vehicle while he was driving it down the highway amounts to operating a vehicle in a manner that is dangerous to the public. I have absolutely no doubt that Vance Narcisse did abandon the driver's seat of the van without stopping the van and thereby allowing it to proceed down the highway with no one in control of the van. Such an action is beyond question operating a motor vehicle in a manner that is dangerous to the public.

[13] The *mens rea* of dangerous driving is determined by a modified objective test. I must be satisfied on the basis of all the evidence that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Would a reasonable person in similar circumstances have been aware of the risk and of the danger involved in the conduct manifested by the accused. Evidence about the Mr. Narcisse's actual state of mind at the time of driving, is relevant to the objective assessment of whether or not such conduct constitutes a marked departure from the norm. The fault lies in the absence of the requisite mental state of care. From all of the evidence I find that Mr. Narcisse left the driver's seat of the moving van in order to avoid detection or responsibility for driving the van while he was impaired. Drunkenness, even if I were to find that Mr. Narcisse was not able to form any intent due to his intoxicated state, is no defence to a charge of dangerous driving since Mr. Narcisse's conduct is measured against that of a sane and sober person acting reasonably or prudently in similar circumstances. In any event I would not find that Mr. Narcisse's action in abandoning the driver's seat of the moving vehicle was an action undertaken while he was in such a drunken state as to not be able to form the intent to do what he did. Clearly he was able to form the intent to do what he did – his intention was to abandon the driver's seat in order to avoid responsibility for driving while impaired. This intention is clear in that he told Ms. Mercredi to get in the driver's seat *as she would not be charged*.

[14] As I stated earlier, Mr. Narcisse's actions in abandoning the driver's seat of a moving vehicle clearly amount to dangerous driving, the *actus reus*, and further a reasonable person in similar circumstances would have been aware of the risk and of

the danger involved in the conduct of Mr. Narcisse. I am satisfied that both the *actus reus*, and the *mens rea* of dangerous driving have been proved beyond a reasonable doubt.

Can a conviction for both driving while impaired and dangerous driving be entered?

[15] No person should be convicted or punished twice for the same conduct, even if two offences could be charged, and each could be proven. In the words of Dickson, C.J.C.: "Canadian Courts have long been concerned to see that multiple convictions are not without good reason heaped on an accused in respect of a single criminal delict."[1]

[16] In the case of *R*. v. *Kienapple*[2], the accused was charged with rape (s. 143) and with unlawful carnal knowledge of a female under the age of 14 (s. 146(1)); both charges pertained to an act of non-consensual sexual intercourse with a 13 year old girl who was not his wife. Laskin, J., for the majority, held:

> It is plain, of course, that Parliament has defined two offences in ss. 143 and 146(1), but there is an overlap in the sense that one embraces the other when the sexual intercourse has been with a girl under age fourteen without her consent. It is my view that in such a case, if the accused has been charged, first, with rape and, secondly, with a s. 146(1) offence, and there is a verdict of guilty of rape, the second charge falls as an alternative charge and the jury should be so directed.
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> …
>
> The relevant inquiry so far as *res judicata* is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences.

[17] In *Prince*, *supra*, Dickson, C.J.C. questioned the use of the term *res judicata* as the foundation for the rule against multiple convictions: "There may be some merit to questioning the choice of terminology selected by the majority, and for this reason I

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[1] *R*. v. *Prince*, 1986 CanLII 40 (S.C.C.), at para. 14

[2] 1974 CanLII 14 (S.C.C.)

prefer to refer to the doctrine enunciated in *Kienapple* as the rule against multiple convictions or, simply, as the *Kienapple* principle."

[18] Dickson, C.J.C. explained that the principle that emerged from the *Kienapple* case recognized the "express recognition that the test for the application of the rule had to be framed not in terms of whether the offences charged were the 'same offences' (or 'included offences'), but in terms of whether the same 'cause', 'matter' or 'delict' was the foundation for both charges."[3]

[19] When an accused is facing two charges, the *Kienapple* principle may be applicable if the offences arise from the same transaction, i.e. there is a factual nexus between the underlying facts that ground the two offences. The question to be asked is: does the same act of the accused ground each of the charges?

[20] Another consideration is the proximity between the offences, are there distinguishing or additional elements contained in one of the offences? Additional or distinguishing elements are different from the presence of shared elements, or elements that are substantially the same as or adequately correspond to an element in each offence. One way in which elements of offences that appear different initially but may correspond to each other is if one offence contains an element that is the particularization of an element in the second offence. A particularization should not be regarded as a distinguishing element that would render the *Kienapple* principle inapplicable.

[21] The offences of driving while impaired and dangerous driving in this case do not arise from the same act of Mr. Narcisse. Mr. Narcisse was driving while his ability to drive was impaired, and his driving may well have been dangerous at that time, but *dangerousness* is not an element of driving while impaired. A person's ability to drive may well be impaired by alcohol, but it does not follow that his or her driving is necessarily dangerous, i.e. the Crown does not have to prove that the driving at the time

[3] *Prince*, *supra*, para. 14

was dangerous. Not only are the elements of the offences different, but in this case the underlying conduct of Mr. Narcisse that grounds the offences is also different. While his ability to drive was impaired, Mr. Narcisse abandoned the driver's seat of the vehicle he was driving on the highway, allowing the vehicle to proceed down the highway without anyone in control. I find that is the conduct that underlies the offence of dangerous driving. On the facts of this case, that conduct does not have to be considered at all to find that Mr. Narcisse was driving while his ability was impaired. The underlying conduct that grounds each of the offences is clearly different. The *Kienapple* principle does not apply to the facts of this case.

[22] Further in this case whereas driving while one's ability is impaired may create an inherently dangerous situation, it is not a particularization of the offence of dangerous driving; as stated earlier it is not necessary that an accused's driving be dangerous in order to sustain a conviction for dangerous driving. Again, the *Kienapple* principle is not engaged in this case.

V. <u>CONCLUSION</u>

[23] I am convinced beyond a reasonable doubt that Mr. Narcisse's ability to operate a motor vehicle was impaired by alcohol; further that he was able to and did form the necessary intention to drive the motor vehicle in a manner dangerous to the public.

[24] Having found that the same cause or matter or delict, is not the foundation for both of the offences charged, entering a conviction for driving while impaired and for dangerous driving does not offend the rule against multiple convictions, also referred to as the *Kienapple* principle.

[25] Mr. Narcisse will be convicted of both offences.

Bernadette E. Schmaltz

Territorial Court Judge

Dated this 26th day of June
In Yellowknife, N.W.T.

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2009 NWTTC 08
T-2-CR-2008000691

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