R. v. Taylor, 2019 NWTTC 14

Date: 2019 09 13
File: T-1-CR-2019-000198

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GARRY TAYLOR

REASONS FOR DECISION
of the
HONOURABLE JUDGE DONOVAN MOLLOY

Heard at:	Yellowknife, NT
Date of Decision:	September 13, 2019
Date of Trial:	August 9, 2019
Counsel for the Crown:	B. Wun
Counsel for the Accused:	S. Whitecloud-Brass

[Sections 145, 259, 270.01 and 320.13 of the *Criminal Code*]

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A. INTRODUCTION

[1] On January 18, 2019, any residents of Yellowknife's Crestview Manor looking out their windows may have thought a movie was being filmed outside. A lone man unsuccessfully attempted to stop a car exiting the Manor's parking lot by drawing a firearm, jumping onto the car's hood and smashing the car's windshield. After falling off the hood, the man watched the car drive away.

[2] The scene, although dramatic, was not part of a movie. The lone man was a police officer. The driver of the vehicle, the accused, was actively being sought by the police. The police officer says the driver knew he was a police officer at the relevant time. The accused, who admittedly lives outside of the law, says he thought the man, previously unknown to him, intended to rob him in a manner sometimes referred to as carjacking. In this context, primary issues under consideration include:

1. What impact, if any, do omissions from the officer's notes have on his credibility?

2. What use can be made of Mr. Taylor's criminal record? and,

3. How does *R. v. W.(D.)*, [1991] 1 S.C.R. 742 apply in this case?

B. THE EVIDENCE PRESENTED AT THE TRIAL

[3] In considering the evidence I note both sides agree the core event happened in a matter of seconds in a highly charged atmosphere. The Crown called one witness, Constable Hugo Levesque. Mr. Taylor testified on his own behalf.

Crown Evidence

[4] The RCMP in Yellowknife were actively looking for Mr. Taylor on January 18, 2019. There were a number of warrants outstanding for his arrest. Two days previously, Mr. Taylor evaded arrest in a manner that intensified the RCMP's perceived urgency surrounding his apprehension and amplified officer safety concerns.

[5] Cst. Levesque, working in plain clothes and operating an unmarked vehicle, was part of team of officers patrolling Yellowknife in an attempt to locate Mr. Taylor. Cst. Levesque advised that prior to seeking out Mr. Taylor, the team convened and agreed that once located, any officer(s) spotting Mr. Taylor would radio for backup. Backup was necessary due to officer safety concerns and foreclosing alternate exit points.

[6] Cst. Levesque parked his unmarked police vehicle near the front of Crestview Manor. While parked, he recognized Mr. Taylor walk by and proceed up the stairs near Crestview Manor. At the top of those stairs, Cst. Levesque said Mr. Taylor appeared to conduct a visual survey of the surrounding area.

[7] Once satisfied Mr. Taylor was out of sight, Cst. Levesque radioed the other officers of his sighting of Mr. Taylor. Cst. Levesque exited the vehicle and walked around the corner of Crestview Manor. Cst. Levesque hoped to determine whether Mr. Taylor entered Crestview Manor or went off in another direction. Cst. Levesque left his hand held radio in the vehicle in order to maintain his 'cover'.

[8] At that time, the corner of Crestview Manor was a tight squeeze for vehicles due to snow and the placement of a garbage bin. On turning the corner Mr. Taylor came face to face with a car being operated by Mr. Taylor. The car had just started to move in Cst. Levesque's direction.

[9] With nowhere else to go, Cst. Levesque held up his hand facing Mr. Taylor to get the car to stop. After the car appeared to increase its speed, Cst. Levesque pulled aside his parka to display the badge worn on his hip. He began aggressively and loudly yelling *police*. Cst. Levesque pulled his sidearm and pointed it at the

car. Given the closeness of the vehicle and seeing nowhere to go, he jumped onto the hood of the car.

[10] While on the car's hood, Cst. Levesque continued to scream his status as a police officer. Using his sidearm in the fashion of a hammer, he beat on the windshield. Due to the Mr. Taylor's aggressive driving manoeuvers to dislodge Cst. Levesque, he let go of his sidearm and at one point Cst. Levesque's grip on the windshield wipers was the only leverage he had.

[11] Despite falling off the car, Cst. Levesque did not suffer any serious injury. Cst. Levesque lost sight of the car once it turned the corner. At the time, Cst. Levesque was unaware that his earlier radio message was not received by the other police officers involved in locating Mr. Taylor.

Defence Evidence

[12] Mr. Taylor described the core event very similarly to Cst. Levesque. Mr. Taylor called his friend, Jenny Andre, to pick him up at Crestview Manor. As he approached Ms. Andre's vehicle he motioned for her to scoot over to the passenger's side. Mr. Taylor described seeing an unknown man *marching* around the corner of Crestview Manor. As the unknown man was blocking the exit Mr. Taylor tried to maneuver the car towards another parking lot exit.

[13] As he was turning the car, he says the man, who he now knows to be Cst. Levesque, jumped on the hood of the car. Cst. Levesque brandished some object and began beating on the windshield. Mr. Taylor says he and Ms. Andre freaked out and he believed he was being *jacked*. The windshield was shattered. After some maneuvering, the man fell off the car's hood and he and Ms. Andre drove away and continued on as if everything was normal.

[14] Mr. Taylor did not see Cst. Levesque's badge and did not hear Cst. Levesque identify himself as a police officer. Mr. Taylor did not call the police as that is not something he does and further, he knew the police were looking for him. Mr. Taylor also did not call the police in regards to any of the previous times he was jacked/robbed in Yellowknife. Mr. Taylor acknowledged that it did occur to him that Cst. Levesque was a police officer.

[15] Mr. Taylor acknowledged his lengthy criminal record on direct examination. His record includes convictions for offences similar to the present offences. There was no request for a *voir dire* and no mention of *R. v. Corbett*, [1988] 1 S.C.R. 670. Mr. Taylor maintained that many of those convictions involved guilty pleas. Mr. Taylor also does not contest the breach of recognizance (by occupying the driver's seat of a motor vehicle) or driving while prohibited charges that arose

from this event. Mr. Taylor points to this history as demonstrating that he is willing to take responsibility for offences he commits, but not those he is not guilty of.

C. THE ONUS AND STANDARD OF PROOF

[16] Like all persons charged with an offence, Mr. Taylor is cloaked with the presumption of innocence until such time as the Crown proves his guilt. Assessing whether guilt is proven requires consideration of the whole of the evidence, as opposed to scrutinizing individual items on a piecemeal basis *(R. v. Kennedy*, 2015 NLCA 14; *R. v. Abramoff*, 2018 SKCA 21).

[17] While the beyond a reasonable doubt standard of proof does not require absolute certainty, it is much closer to that standard than it is to the balance of probabilities (*R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Starr*, [2000] 2 S.C.R. 144).

[18] As Mr. Taylor testified, I must also engage in a three step analysis when assessing his credibility *(R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742*).*

D. PARTIES' POSITIONS

Crown

[19] The Crown maintains that Mr. Taylor knew RCMP officers were actively looking for him. In all of the circumstances, the Crown submits that Mr. Taylor knew Cst. Levesque was a police officer and drove at Cst. Levesque for the purposes of evading being taken into police custody. In essence, the Crown maintains that Mr. Taylor's evidence is contrived in an attempt to avoid conviction for these offences.

[20] As for his criminal record, the Crown maintained that *by virtue of the number of convictions and the length of his record, Mr. Taylor has no difficulty being in conflict with the law* and *therefore his credibility is undermined*. The Court pointed out that this sounded like a propensity inference, and noted very few of the convictions related to crimes of dishonesty. Those that did relate to dishonesty were minor and dated offences. In response, the Crown maintained that by virtue of the number of convictions, I could infer that Mr. Taylor was a person *who would have no difficulty lying under oath*. The Crown maintained that case authority supported this proposition but did not produce any authority.

Defence

[21] Mr. Taylor maintains that he simply took action to avoid an unknown man who he believed intended to rob him of his property. If Mr. Taylor did not know

that Cst. Levesque was a police officer, he cannot be found guilty of using a motor vehicle to resist arrest. Given his history as a victim of robbery/jacking and the fact that Cst. Levesque was in plain clothes, Mr. Taylor argues that his assumption that he was about to be robbed is reasonable and the Court should, at a minimum, be left in doubt on the resisting arrest charge.

[22] In terms of relying on Cst. Levesque's evidence, the defence spent a considerable amount of time on cross-examination pointing out a number of significant omissions from the officer's notes and the events as described in his testimony. Based upon those omissions the Defence advocates caution in assessing of the reliability of Cst. Levesque's evidence.

E. ANALYSIS

What impact, if any, do omissions from the officer's notes have on his credibility?

[23] Significant omissions from Cst. Levesque's notes include no mention of the presence of an additional person in the car and details regarding Cst. Levesque's actions while leading up to and during the core event.

[24] Police officers have a duty to make detailed notes. In *Woods v. Schaeffer*, [2013] 3 SCR 1053, the Court stated:

> *…the duty to make careful notes pertaining to an investigation is an important part of the investigator's broader duty to ensure that those who commit crimes are held accountable for them.*

[25] That said, omissions or a lack of notes does not mean that something did not happen simply because an officer did not make a note of it. As with many considerations, all of the surrounding circumstances must be considered, including the number and significance of the omissions. An officer's explanation, if any, as to the omissions is also relevant.

[26] In *R. v. Antoniak*, 2007 CarswellOnt 7894, the Court discussed relevant factors in assessing omissions from an officer's notes:

> *In deciding whether to accept an officer's testimony, the trier of fact may consider whether the officer recorded his or her observations. Certainly the absence of a note is a fair issue for cross-examination and may support an inference that the unrecorded event did not take place. However, the fact that there is no mention of an event in an officer's notebook does not necessitate a finding that it did not take place.*

[27] Cst. Levesque, in addressing the omissions from his notes, advised that he made the notes shortly after the event while still in a highly charged state, given that it was one of the closest calls to being killed or seriously injured that he experienced in his career as a police officer. It did not occur to him to make supplemental notes once calm and he was not interviewed by any other officer regarding his interactions with Mr. Taylor.

[28] What occurred is not the best practice in terms of Cst. Levesque's note taking or the conduct of the investigation generally by the RCMP. However, having listened carefully to his evidence, and considering all of the surrounding circumstances, I find that the omissions from Cst. Levesque's notes do not significantly detract from his credibility or reliability in this case.

What use can be made of Mr. Taylor's criminal record?

[29] Our criminal justice system is predicated upon conviction only after the Crown adduced sufficient evidence to prove guilt beyond a reasonable doubt. For centuries, our system has eschewed basing guilt on propensity. In *R. v. Lavallee*, 2001 SKCA 43, dealing with alleged errors in a jury charge, the Court noted:

> *Furthermore, the correction made by the trial judge failed to correct another erroneous part of the direction. She said: "Each accused admitted to a series of criminal convictions and, for this reason, is considered to have an unsavoury reputation." This reference to unsavoury reputation violates the fundamental rule that evidence of the character of the accused is not admissible unless the accused himself puts his character into issue. It follows that a judge may not comment upon it. While the accused was compelled to admit to previous convictions by reason of s. 12 of The Canada Evidence Act, the fact of the convictions is only admissible as it relates to credibility. The burden of proof remains on the Crown,* ***and the introduction of the previous convictions creates no presumption of guilt nor does it create a presumption that the accused should not be believed****. The prior convictions are simply evidence for the jury to consider, along with everything else, in assessing the credibility of the accused. See R. v. Corbett, [1988] 1 S.C.R. 670 (S.C.C.) at p. 687. The British Columbia Court of Appeal, in R. v. McIlvride (1979), 10 C.R. (3d) 95 (B.C. C.A.), held that it was reversible error to tell a jury that an accused's having a criminal record brands him as an unreliable person to give evidence under oath.* [emphasis added]

[30] A line of authority flowing from *R. v. Charland*, 1996 CanLII 7284 (ABCA) suggestis that the length of a criminal record might lead to an inference of

disregard for societal norms, including the prohibition on lying. That line of authority relies in part upon the following quote from the *obiter* of the majority decision:

> *However, particularly in the context of a lengthy criminal record, such prior convictions have probative value that is greater than trifling because a jury could reasonably conclude that the convictions reflect a disregard for the laws and rules of society, making it more likely that the person who harbours such attitudes would lie.*

[31] The crux of the matter in *Charland* involved whether, in permitting cross-examination of the accused on his prior criminal record, the trial judge:

i. Applied the correct test;

ii. If yes, was there any basis to interference with the judicial exercise of discretion to permit the cross-examination; and,

iii. If no, did the jury instructions adequately negate the risk of improper propensity reasoning by the jury?

[32] The Court simply confirmed that the trial judge applied the correct test, found no basis to interfere with the judicial exercise of discretion and assessed the charge to the jury as adequate. It did not conclude that a lengthy record is always relevant to credibility by increasing the likelihood of lying. *Charland* also clearly affirmed that regardless of the reasons for allowing such cross-examination, propensity reasoning is never appropriate.

[33] Notably, in refusing leave to appeal, the Supreme Court of Canada simply addressed the exercise of discretion by the trial judge and did not specifically endorse any of the other comments in the majority decision (R. v. *Charland*, 1997 CarswellAlta 1114):

> *This is a discretionary decision. It is difficult to say that this was a wrongful exercise of that discretion.*
>
> *The trial judge very carefully and correctly instructed the jury both before the cross-examination by Crown counsel and in his charge as to the very limited use they could make of that evidence.*

[34] Finally, on the same date that it refused leave on *Charland,* the Supreme Court of Canada issued its decision in *R. v. Underwood,* 1997 CarswellAlta 1080, overturning in part a decision of the Alberta Court of Appeal in regards to whether an accused was entitled to a *Corbett voir dire* prior to choosing to testify. In

holding that an accused is entitled to a *voir dire* prior to testifying, the Court recognized that in limited circumstances, including where the nature of the defence evidence or strategy involves a general attack on the credibility of the Crown's witnesses, the probative value of an accused's prior convictions may be higher:

> *In my view, the situation can be resolved by holding a voir dire before the defence opens its case. In this voir dire, the defence will reveal the evidence which it intends to call, either through calling witnesses, or through agreed statements of fact. The trial judge can then consider the factors set out in Corbett (the nature of the previous convictions, the time since the previous convictions, and any attacks made on the credibility of Crown witnesses) in the context of the defence evidence, and make a final ruling on the Corbett application.*

[35] By way of example, *R. v. Laing*, 2016 ONCA 184 epitomizes a situation where the accused's prior convictions had a higher probative value due to his general attack on the character of the Crown's witnesses and allegations that he was framed by police officers. Accused persons are entitled to fair trials and not the most favourable trials possible. As such, where the nature of the defence is similar to that in *Laing*, refusing to allow cross-examination on an accused's prior convictions could distort the search for the truth. Even in such circumstances, adequate cautions must still be given against improper inferences as to propensity.

[36] The decision in *Underwood* in no way endorses the statement of the majority of the Alberta Court of Appeal in *Charland* as to the sweeping proposition that lengthy criminal records generally establish a predilection towards lying under oath. Given that both decisions are from the late 1990s, and the evolution of our understanding of fundamental principles of justice since then, the views of the Supreme Court of Canada on this issue may also be different were it required to address it today.

[37] In the conduct of his defence, Mr. Taylor did not attack Cst. Levesque's character or suggest any conspiracy. I reject entirely the Crown's submission that Mr. Taylor's criminal record brands him as a person *who would have no difficulty lying under oath*. To the limited extent that Mr. Taylor's record reflects offences of dishonesty (thefts as a youth in 1994 and 1996 and one as an adult in 2009), it is relevant to his credibility but not of significant weight.

How does R. v. W.(D.), [1991] 1 S.C.R. 742 apply in this case?

[38] Where the accused testifies, pursuant to the rationale in the *W.(D.)* decision, a three step analytical exercise is preferred. Those steps require that trial judges:

i. Ask whether they believe the testimony provided by the accused. If so, an acquittal must be entered.

ii. If not believed, consider whether the accused person's evidence causes them to have a reasonable doubt concerning the accused person's guilt. If so, an acquittal must be entered.

iii. If the answer to both questions is no, consider the totality of the evidence presented to determine if the accused's guilt has been proven by the Crown beyond a reasonable doubt.

[39] The fundamental issue with Mr. Taylor's evidence is his minimization of his awareness that the RCMP was actively trying to arrest him. Mr. Taylor had also never been jacked while operating a motor vehicle. Other than describing Cst. Levesque as purposefully marching, there is no realistic basis for Mr. Taylor to assume that Cst. Levesque was about to effect a carjacking.

[40] I accept that Cst. Levesque feared death or serious injury and in that heightened state of fear, he was loudly and aggressively yelling his status as police officer. Mr. Taylor's claim that neither he nor Ms. Andre would be able to hear what Cst. Levesque was saying is disingenuous. The fact that the car's windows were rolled up and some music may have been playing would not have distracted them from the man on the hood of their car. Anything the unknown man was saying would have been the focus of their attention given that Mr. Taylor says neither of them knew the man or what his intent was.

[41] According to Mr. Taylor, Ms. Andre is a regular law abiding citizen. While his motivation for not calling the police is obvious, to suggest that a law abiding citizen would not report what occurred flies in the face of the probabilities that a reasonable person would expect to prevail in all of the circumstances. Based upon Mr. Taylor's evidence, Ms. Andre had no way of knowing whether she was the target of the unknown man. The man attacked her vehicle and she was driving it immediately prior to the unknown man's appearance. If the man and his intentions were truly unknown, the fear that the man might target her or her vehicle again would be substantial. I find that Ms. Andre did not call the police because it was evident to both her and Mr. Taylor that Cst. Levesque was a police officer.

[42] Mr. Taylor also testified that his directing Ms. Andre to move to the passenger side of her vehicle was simply a matter of him being more familiar with Yellowknife than she was. Mr. Taylor acknowledges he was bound by an undertaking not to occupy the driver's seat of a motor vehicle and subject to a *Criminal Code* driving prohibition. Assuming the driver's position was not a matter of convenience or otherwise. Mr. Taylor was well aware of the likelihood of

the police trying to stop him again and occupied the driver's seat should that contingency occur and evasive action become necessary.

[43] Mr. Taylor was wilfully blind or reckless as to whether the then unknown man was a police officer and decided to use the car to evade being taken into custody. On Cst. Levesque ending up on the hood of the vehicle and persistently yelling that he was a police officer, Mr. Taylor knew that he was dealing with a police officer. Despite that knowledge, he continued to operate the car in a manner dangerous to the public and Cst. Levesque, with the intention of evading arrest.

[44] Based on all of the above, in terms of *W.(D.)*, I neither believe nor am left in doubt by Mr. Taylor's evidence. In terms of the third element of the analysis, on the totality of the evidence I am satisfied that the Crown has proven Mr. Taylor's guilt beyond a reasonable doubt on all charges.

F. CONCLUSION

[45] For the reasons provided Mr. Taylor is convicted on the charges pursuant to sections 145(3), 259(4), 270.01(1)(a) and 320.13(1) of the *Criminal Code*.

[46] Judgement accordingly.

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DONOVAN MOLLOY, T.C.J.

Dated at Yellowknife, Northwest Territories,
this 13th day of September, 2019.

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