

Citation: *R. v. Cletheroe*, 2021 YKTC 6

Date: 20210219
Docket: 20-10020
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

STACEY STANLEY CLETHEROE

Appearances:
Amy Porteous
Malcolm E. J. Campbell

Counsel for the Crown
Counsel for the Defence

RULING ON VOIR DIRE

[1] Mr. Stacey Cletheroe is charged with possession of cocaine for the purpose of trafficking. The charge arises following the execution of a search warrant issued under s. 11 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“CDSA”), on May 17, 2019, authorizing a search of a Watson Lake residence.

[2] Mr. Cletheroe has applied to quash the search warrant. Additionally, he seeks to have all evidence obtained as a result of the execution of the search warrant excluded, based on a breach of his s. 8 *Charter* right to be secure against an unreasonable search and seizure, and pursuant to s. 24(2) of the *Charter*. Specifically, this *voir dire* ruling deals with Mr. Cletheroe’s challenge to the validity of the search warrant for his

residence, based on his contention that there is insufficient information on the face of the Information to Obtain (“ITO”) to uphold the search warrant.

Background

Hearing

[3] No viva voce evidence was presented at the hearing of this application. The application comprised a review of a redacted copy of the ITO that had been provided to defence counsel. The redacted copy was filed as an Exhibit on the *voir dire*. No request for amplification of the grounds in the ITO was made, nor did counsel for Mr. Cletheroe apply to cross-examine the affiant. Crown and defence counsel made submissions based on the information contained in the redacted ITO.

The Search Warrant

[4] The police presented the impugned ITO and Search Warrant to the authorizing judge by way of telecommunications on May 17, 2019. The judge signed the Search Warrant, authorizing the search of 717 Frances Avenue, Watson Lake, Yukon for cocaine and various other items related to the trafficking of this drug.

The ITO

[5] Cst. Beaudoin of the Watson Lake RCMP initially received information from an informant of known reliability and credibility in March 2019 (a reference to April 2019 in para. 2 of the ITO appears to be a typographical error) that Mr. Cletheroe traffics in cocaine in that community, that he drives a small grey car, and that he lives at Blandon Donnessey’s residence.

[6] The officer learned, by consulting a police database, that Mr. Cletheroe had been convicted for drug trafficking in 2002 (3 grams of cocaine to an undercover officer) and for possession for the purpose of trafficking in 2011 (35 grams of crack cocaine).

[7] Cst. Beaudoin read a report that on March 19, 2019, Cst. Nedohin of the Watson Lake RCMP received surveillance video regarding an incident that occurred on March 12, 2019, outside a local motel.

[8] Cst. Nedohin indicated in his report that he believed that the surveillance video depicted suspicious activity, culminating with an individual whom he believed was Mr. Cletheroe making a hand to hand drug transaction in a silver Kia Forte with British Columbia licence plates. Cst. Nedohin reported that on the afternoon of March 19, 2019, he pulled over the silver Kia, and spoke to the driver and registered owner. When asked who else had permission to drive her vehicle, she replied that her friend, Stacey Cletheroe, had permission to drive the vehicle whenever he wanted. The officer learned that the registered owner was convicted in 2007 of possession of a Schedule 1 substance for the purpose of trafficking.

[9] In April 2019, the same informant told Cst. Beaudoin that Mr. Cletheroe sells drugs out of Bandon Donnessey's residence, and that Mr. Cletheroe carries drugs on his person and delivers same. Cst. Beaudoin confirmed in May 2019, that as recently as March 2019, Bandon Donnessey was living at 717 Frances Avenue, Watson Lake.

[10] On April 18, 2019, at 7:15 a.m., Cst. Beaudoin observed Mr. Cletheroe driving the silver Kia. Later that morning, the officer observed him again driving the vehicle and making a short stop at Ravenhill Drive, and soon thereafter stopping in the driveway of

another residence where he changed vehicles. He departed in a dark green Ford F150 truck belonging to a third party, and drove to 717 Frances Avenue, where he parked the truck.

[11] On April 26, 2019, at 1:36 a.m., Cst. Beaudoin noted a white GMC Terrain in the driveway of 725 Frances Avenue, the residence of Gil Labine. The lights of the vehicle were on and the engine running. An unidentified male was at the driver's side door. Another unidentified male wearing a hoodie was walking from a wooded area behind 725 Frances Ave. In September 2018, police had executed a search warrant at the Labine residence and located drug paraphernalia. The police had also executed another search warrant in September 2018, at 718 Liard Avenue, a residence on the other side of the wooded area from which the male with the hoodie was coming. At 718 Liard Avenue, police located cocaine, a handgun, a Taser and other evidence of drug trafficking.

[12] On April 26, 2019, at 1:57 a.m. Cst. Beaudoin noted the white GMC Terrain drive to the Alaska Highway and make a quick stop at Andrea's hotel. The vehicle made a 12-minute stop at 234 Stubenberg Boulevard, before driving to 717 Frances Avenue. Cst. Beaudoin learned that the registered owner of the white GMC Terrain, Sarah Fox, had an association with Mr. Cletheroe, based on a June 2018 incident in Teslin.

[13] On the evening of April 26, 2019, Cst. Beaudoin observed Mr. Cletheroe get out of the white GMC Terrain at 618 Liard Avenue (where police had seized small amounts of marijuana in 2016 and 2018). He appeared to be pulling a small shaped object (possibly a cardboard box) out of the trunk.

[14] In late April 2019, the informant spoke to Cst. Beaudoin. Although the information with respect to this conversation is partially redacted, the latter part of the paragraph reveals that the informant had knowledge of cocaine being purchased from Mr. Cletheroe at 717 Frances Avenue.

[15] On May 6, 2019, at 2:35 a.m., Cst. Beaudoin observed a large black Ford pickup truck in front of the CIBC bank. It appeared to the officer that someone exited the vehicle and entered the mezzanine area where the automated banking machine is located. Eight minutes later, the officer observed the white GMC Terrain attending at Andrea's hotel. As Mr. Cletheroe exited this vehicle, Cst. Beaudoin saw him look back in the officer's direction. The officer was driving a marked police vehicle.

[16] At approximately 2:48 a.m., Cst. Beaudoin noted Mr. Cletheroe driving towards the Tags gas station. The large black Ford pickup truck that the officer had seen earlier was parked at the Tags gas station pumps closest to the main entrance. Mr. Cletheroe drove the white GMC terrain to the opposite side of the pumps where the black Ford truck was parked. All other pumps were vacant at the time. The officer drove by the gas station to observe what was happening. He subsequently obtained license plate information of the black Ford truck as it drove away, and learned that the vehicle was registered to Harlan Schilling.

[17] At 3:00 a.m., Cst. Beaudoin observed the white GMC Terrain which Mr. Cletheroe had been driving, parked and unattended at 717 Frances Avenue.

[18] On May 12, 2019, Cst. Beaudoin reviewed surveillance video from the Tags gas station regarding the early morning incident on May 6. In the ITO, the officer describes

the sequence of events which he viewed in the video. He also included photographs, with descriptions, taken from the surveillance video. Although the officer presented the ITO and search warrant by way of the telewarrant process, resulting in the photos being black and white, and unhelpful, the authorizing judge was also provided with a PDF document of the ITO containing good quality coloured photos.

[19] At 2:42 a.m., Kavan Schilling drove the large black Ford truck to pump number 2. Two passengers are noted to be in the back of the vehicle. Mr. Schilling uses a card to activate the pump and begins pumping fuel into the truck. He finishes fueling at 2:44 a.m. Before getting into his truck, he looks at his smart phone. He enters the driver's seat, looks at his phone, and then exits the vehicle to close his gas tank cap.

[20] Once Mr. Schilling is back in the truck, he looks at his phone while Mr. Cletheroe pulls into the service station lot. Mr. Schilling begins to slowly pull away from the pump, but stops, reverses direction, and backs up to the pump. His phone remains lit on his lap, and he appears to be adjusting something in the front pocket of his hoodie. He starts to exit the truck while looking in the direction of the white Terrain which has now pulled up to pump 1 beside him. At this point, Mr. Cletheroe has exited the Terrain and is standing near pump 1. At 2:45 a.m., Mr. Schilling, who has his hands in his hoodie pocket, walks quickly around the pump towards Mr. Cletheroe. Mr. Schilling gets to within a few feet of Mr. Cletheroe before quickly turning around and returning to pump 2. He walks past pump 2 while removing his wallet from his hoodie pocket while facing the area where Mr. Cletheroe is standing. Mr. Schilling's hands are no longer visible but he is not observed to use the pump while his wallet is out. According to Cst. Beaudoin, the

video shows Mr. Schilling putting his right hand with his wallet back into his hoodie pocket. His left hand is not visible.

[21] At 2:46 a.m., Mr. Schilling appears to have finished interacting with Mr. Cletheroe and returns to his vehicle. The video depicts him looking over the box of his truck towards the area where Cst. Beaudoin would soon drive by. Mr. Schilling stands by the driver's door of the truck, before appearing to turn towards Mr. Cletheroe again, looking around again, and entering the driver's side door. Mr. Schilling takes his phone off the centre console and again looks back in the direction of Mr. Cletheroe. He rolls down his window and says something to Mr. Cletheroe, who has moved closer to the truck. This interaction lasts for approximately 15 seconds. Mr. Cletheroe opens his rear passenger side door and places his head and upper body into it. Mr. Schilling drives away as Mr. Cletheroe turns around to face the pump. At 2:48 a.m., Mr. Cletheroe is back in his vehicle after appearing to finish fueling. He then departs.

[22] On May 14, 2019, police attended Blandon Donnessey's residence at 717 Frances Avenue with respect to an issue between Sarah Fox and Mr. Cletheroe. Upon the police's attendance, Mr. Cletheroe answered the door, and ultimately spoke to the officers outside. On May 16, 2019, Cst. Beaudoin spoke to Cst. Woodman, one of the officers who had been at 717 Frances Avenue on May 14. She told Cst. Beaudoin that Mr. Cletheroe, after answering the door, was in the process of shutting it on the officers before Cst. Woodman advised him that she did not have to enter the residence to talk to him. As a result, Mr. Cletheroe spoke to the officers outside the residence in regards to Ms. Fox no longer being welcomed there.

[23] Cst. Beaudoin, the affiant, outlined his investigation experience in the ITO. Although he had only worked with the RCMP for four years at the time, he spent three years working in the Hamilton-Niagara area, primarily investigating “local organized crime groups and their involvement in the trafficking and importation of controlled drugs and substances”. Additionally, he developed experience recruiting and handling informants.

Positions of the Parties

[24] Counsel for Mr. Cletheroe submits that the confidential source information is weak, in that it is not detailed, and it also is unclear whether it is first or second hand information. Additionally, counsel submits that there was no information in the ITO to establish, on the requisite standard, that drugs would be located at 717 Frances Avenue on May 17, 2019.

[25] Counsel for Mr. Cletheroe contends that the police investigation of Mr. Cletheroe was coloured by the initial vague confidential source information, and that the subsequent investigation in no way bolsters the source information. The police investigation produced information that is, at best, equivocal.

[26] The defence contends that there is no information to corroborate the confidential source information that Mr. Cletheroe was storing drugs at 717 Frances Avenue. Also, there is no temporal nexus between the source information received in March and April 2019, and the application for a search warrant for that residence on May 17, 2019.

[27] The defence submits that police sought an extended period to execute the search warrant to ensure that Mr. Cletheroe would be present at the residence. This indicates that the police did not really believe that drugs were stored in the house, and instead wanted Mr. Cletheroe present in the house, in order to search for drugs on his person.

[28] The Crown reminds me that the Search Warrant is presumptively valid, and that the burden is on Mr. Cletheroe to satisfy the Court that there was no basis on which it could have issued. If the reviewing judge concludes that the authorizing judge could have granted the authorization, that is the end of the matter. The reviewing judge should not substitute their view for that of the authorizing judge.

[29] The Crown lists a number of factors that would point to Mr. Cletheroe being involved in the trafficking of drugs, including using multiple vehicles without any contact with their owners, the surveillance video from the local hotel, and from Tags. The Crown contends that the circumstances that unfolded at Tags support Cst. Beaudoin's belief that a drug transaction occurred there in the early morning hours of May 6, 2019.

[30] The Crown also points to Exhibit A to the ITO, which although redacted, sets out that in late April 2019, the informant told the police about a drug transaction at 717 Frances Avenue in which cocaine was purchased directly from Mr. Cletheroe, as well as Mr. Cletheroe selling cocaine a few days before the earlier transaction at a location that is unspecified due to redactions.

[31] The Crown submits that the information received from the confidential source is credible, compelling, and corroborated.

Analysis

Standard of Review

[32] The reviewing judge of an authorization of this nature is in a different position and has a different function than the authorizing judge. As the Court in *R. v. Araujo*, 2000 SCC 65, stated at para. 51, "...[h]e or she does not conduct a rehearing of the application for the wiretap".

[33] The Court also noted in the same paragraph:

... In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.

[34] The test for a reviewing judge is summarized in *R. v. Whitaker*, 2008 BCCA 174, at para. 43:

When a judicial order authorizing a search or seizure is challenged at trial, the trial judge's role is to determine whether the order could have been granted. This determination is made based on the record which was before the authorizing judicial officer as amplified on the review: *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65 at para. 51. As succinctly stated by Madam Justice Rowles in *R. v. Al-Maliki*, 2005 BCCA 157, 201 C.C.C. (3d) 96, "[t]he test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether, in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge": para. 19.

[35] The Court in *R. v. Pitre*, 2011 NBCA 106, at para. 3, indicated that a warrant issued pursuant to s. 11 of the *CDSA* "...requires a demonstration by information on oath that there are reasonable grounds to believe there is in the place to be searched:

(1) a controlled substance in respect of which the CDSA has been contravened; or (2) a thing that will afford evidence of any such contravention...”.

[36] As mentioned, in the matter before me, I have not viewed the entirety of the information put before the authorizing judge. It is clear, however, that my decision as to sufficiency of the ITO must be based on the redacted copy (see *R. v. Wing*, 2009 YKTC 113, at para. 13).

[37] The Court in *Pitre* also stated at para. 34, having considered appellate and Supreme Court of Canada jurisprudence:

Needless to say, the reviewing court never knows what the warrant judge would have done if the atrophied ITO had been put to him or her. For there to be a meaningful and principled review at trial of the sufficiency of the ITO in accordance with the *Araujo* test, the issue must be whether the authorizing judge, acting judicially, could have given his or her imprimatur on the basis of what remains of the information on oath he or she was provided. To my mind, the "acting judicially" component of the test brings into the mix an objective standard: could the issuing judge, acting judicially, have issued the warrant on the basis of the information provided in the atrophied ITO? ...

The Reasonable Grounds Test

[38] In order to issue a warrant pursuant to s. 11 of the CDSA, a justice who hears an *ex parte* application must be satisfied “by information on oath that there are reasonable grounds to believe” that a controlled substance is in the place to be searched. It is without question that the reasonable grounds standard is less than the civil standard of proof. In *R. v. Hanareh*, 2017 BCCA 7, the Court stated at para. 39:

The reasonable grounds standard requires something more than mere suspicion, but something less than the standard applicable in civil matters of proof on the balance of probabilities: *Mugesera v. Canada (Minister of*

Citizenship & Immigration), 2005 SCC 40 at para. 114. The appropriate standard is one of reasonable probability: *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166. ...

See also *R. v. Jir*, 2010 BCCA 497 at para. 27.

[39] Although various phrases have been used to express the meaning of reasonable grounds, such as “probable cause” or “reasonable probability”, it was summed up by the Supreme Court of Canada in *Hunter et al. v. Southam Inc.*, [1984], 2 S.C.R. 145, at p. 167:

The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. ...

[40] In the case at bar, the police initiated the investigation of Mr. Cletheroe after having received confidential information from the informant. Based on the redacted material before me, it appears that the informant provided the police with information about the accused and his involvement in drug trafficking on three separate occasions in March and April 2019.

[41] The Supreme Court of Canada in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, considered the special requirements applying to information of confidential sources that is relied on to obtain an authorization. In considering the reliability of the informant's evidence, the Court stated at para 68:

...

(ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

- (a) the degree of detail of the "tip";
- (b) the informer's source of knowledge;
- (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.

[42] In *R. v. MacDonald*, 2012 ONCA 244, the Court reiterated, at para. 7, that in hearing an application for a warrant "based largely" on confidential informant information, a judge, as per *R. v. Debot*, [1989], 2 S.C.R. 1140, must make three inquiries, namely:

- Was the information predicting the crime compelling?
- Was the source of the information credible?
- Was the information corroborated by police before conducting the search?

[43] The Ontario Court of Appeal further indicated that the three examinations are "not watertight inquiries". A judge must determine whether the "totality of the circumstances" meets the reasonable probability standard.

[44] A judge may take into account the training and experience of the investigating officer in assessing whether the requisite standard has been met (see *R. v. MacKenzie*, 2013 SCC 50, at para. 62).

[45] The Court in *R. v. Perkins*, 2018 BCSC 307, noted at para. 14:

In reviewing the application materials submitted for a production order or a warrant, the grounds must be assessed from the standpoint of a reasonable person standing in the shoes of the police officer, and in this respect the experience of the affiant is relevant: *R. v. Tran*, 2007 BCCA 491 at paras. 12-13.

Discussion

[46] In the matter before me, the ITO outlines that the informant previously provided reliable information to the Watson Lake RCMP. In particular, the informant's information assisted police in obtaining search warrants and seizing illegal drugs on four occasions. In three of those files, the seizures led to convictions for possession for the purpose of trafficking offences. In the fourth file, the police executed search warrants at two locations. At one location, cocaine was seized, while at the other drug paraphernalia was located. The informant had a positive track record as a result of the reliable and credible information previously provided. The ITO stipulates that the informant had not provided any misleading information to police.

[47] Although the informant provided certain general information to the police about Mr. Cletheroe, other information was more specific. For example, the informant advised police that the accused was trafficking in cocaine, and in late April 2019, the informant had knowledge of two purchases of cocaine from Mr. Cletheroe, including one at 717 Frances Avenue.

[48] Next, I turn to whether the information the informant provided to the police about Mr. Cletheroe was corroborated. The police took steps to determine what vehicle or

vehicles Mr. Cletheroe was driving. The traffic stop of the silver Kia by Cst. Nedohin on March 19, 2019, resulted in the registered owner stating that the other individual who had permission to drive the vehicle whenever he wanted was Mr. Cletheroe. Although the vehicle in question was silver in colour, as opposed to grey as indicated by the informant, in my experience the difference between those two colours is, at times, hard to distinguish.

[49] That same vehicle was also involved in a suspected drug transaction on March 12, 2019. Although the police did not provide sufficient information in the ITO, in my view, as to why they believed Mr. Cletheroe was operating the vehicle on that occasion, the police did subsequently observe him driving that vehicle.

[50] The informant indicated that Mr. Cletheroe was residing at 717 Frances Avenue, the residence of Blandon Donnessey. The police confirmed that Mr. Donnessey lived at that address. They also observed Mr. Cletheroe driving to and parking at that residence on more than one occasion. After a suspected drug transaction involving Mr. Cletheroe on May 6, 2019, the police later observed the vehicle, that he had just been driving, parked in the middle of the night at 717 Frances Avenue. Finally, Mr. Cletheroe was at that residence when police went to speak to him about an unrelated matter on May 14, 2019, and Cst. Woodman learned that he had been staying there.

[51] As mentioned, the informant told police that Mr. Cletheroe was trafficking in cocaine. The police confirmed that Mr. Cletheroe has two criminal convictions (trafficking and possession for the purpose of trafficking) involving cocaine.

[52] The informant advised police that Mr. Cletheroe traffics from 717 Frances Avenue, and that he carries drugs on him and delivers them. The suspected drug transaction in the early morning hours of May 6, 2019, involved Mr. Cletheroe attending a local gas station and interacting with another individual, Mr. Schilling, who had earlier apparently accessed money from an automated banking machine.

[53] The actions of Mr. Schilling, as described in the ITO and as depicted in video surveillance stills, are quite suspicious, and consistent, in my view, with a drug transaction in which he is purchasing drugs from Mr. Cletheroe. Additionally, Cst. Beaudoin, based on his drug investigation experience, believed that this was a hand-to-hand drug related transaction.

[54] Finally, in terms of whether the information is compelling, I find that it is moderately compelling. Mr. Cletheroe has previous convictions for trafficking and possession for the purposing of trafficking in cocaine, and the informant identified him as a trafficker of cocaine. The existence of a prior criminal record deserves some weight, but does not, in and of itself, make out reasonable grounds (see *R. v. DeBot* (1986), 17 O.A.C 141). The cogency of the criminal record comes from its similarity to the alleged behaviour, although it must be remembered that the two drug convictions are not particularly recent. Additionally, in late April 2019, the informant did provide further information that Mr. Cletheroe trafficked cocaine on two occasions, including one from 717 Frances Avenue, although it is unclear (due to redactions) whether that information is first or second-hand.

[55] In the final analysis, the matter before me is arguably a stronger fact situation than in *MacDonald* where the Ontario Court of Appeal held that the accused's criminal record, plus anonymous tipster information - much of it biographical - which had been corroborated by the police, translated into sufficient grounds to issue a search warrant.

[56] In the case at bar, in addition to information from a credible and reliable informant, the police not only corroborated the information, they investigated a suspected late night hand-to-hand drug related transaction involving Mr. Cletheroe.

[57] Relying on his drug trafficking investigation experience, Cst. Beaudoin opined that drug traffickers keep their drugs close to them (on them and/or in their residence). As it related to Mr. Cletheroe, the officer had information from a reliable informant, and his own investigation was consistent with this premise.

[58] I am unable to accept defence counsel's submission that there was no temporal nexus between the investigation and the application for the search warrant. The freshest incidents forming part of Cst. Beaudoin's grounds occurred on May 6, 2019, (the suspected hand-to-hand transaction) and May 14, 2019 (Mr. Cletheroe moving to shut the door of 717 Frances Avenue in the face of the police officers, before agreeing to speak to them outside the residence). Both of these incidents are close in time to May 17, 2019, when the officer applied for a search warrant.

[59] I also disagree with the submission that the fact that police wished to execute the search warrant when Mr. Cletheroe was in Watson Lake, undercuts Cst. Beaudoin's stated belief that they would locate illicit drugs at 717 Frances Avenue, as opposed to solely on Mr. Cletheroe. It is true that the police requested an approximate three-day

period to allow them to have sufficient officers in place in this small community to execute the warrant. However, Cst. Beaudoin also set out in the ITO that if Mr. Cletheroe was not in the community at the time of the execution of the warrant, he would be in a better position to destroy any illegal substances that he might be carrying on his person. I understand that to mean that if he had not been in the house at the time of the execution of the warrant, the police would have made efforts to have him arrested concurrently, wherever he might be located in the community.

[60] In my estimation, the police investigation, comprised of both informant information and police observations, provided them with sufficient grounds to comply with the requirements of s. 11 of the *CDSA*.

[61] On balance, having considered the whole of the information contained within the ITO, I am of the view that there was some evidence that might reasonably be believed on the basis of which the search warrant for 717 Frances Avenue could have issued.

[62] In the result, Mr. Cletheroe's application to quash the search warrant is dismissed.

CHISHOLM C.J.T.C.