Citation: *R. v. Patteri*, 2022 YKTC 32

Date: 20220728
Docket: 20-00826
Registry: Whitehorse

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

REGINA

v.

JOHN GLENN PATTERI

Appearances:
Mina Connelly — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON APPLICATION

[1] John Patteri has been charged with having committed offences contrary to ss. 244 (x2), 87(2) (x2), 88(2), and 86(1) (x2) of the *Criminal Code*.

[2] Counsel for Mr. Patteri has filed a Notice of Application (the "Application") seeking the exclusion of all evidence obtained on February 19, 2021, resulting from the execution of a search warrant issued on February 17, 2021.

[3] Counsel also seeks leave to cross-examine Cst. Gilroy, who is the affiant for the search warrant.

[4] Counsel submits in para. 1 of the Application that:

> The search warrant is sub-facially invalid because the ITO [Information to Obtain] sworn to obtain the search warrant contains false and misleading information and did not constitute full, frank, and fair disclosure to the authorizing judge.

[5] In para. 9 of the Application, counsel has set out the paragraphs of the ITO that she wishes to cross-examine Cst. Gilroy on.

[6] Crown counsel opposes the application to cross-examine Cst. Gilroy.

Law

[7] In ***R.*** v. ***Garofoli***, [1990] 2 S.C.R. 1421, the Court stated the test for cross-examination of the affiant as follows, at para. 88:

> …Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.

[8] In ***R.*** v. ***Pires****;* ***R.*** v. ***Lising***, 2005 SCC 66, the Supreme Court provided guidance to lower courts regarding how to approach these applications, stating at para. 69:

> …the threshold test for determining whether cross-examination should be allowed is separate and distinct from the ultimate question of whether the authorization is valid. Hence, in determining whether the threshold test has been met, the trial judge cannot decide the question simply on the basis that other parts of the affidavit would support the authorization. The focus, rather, must be on the likely effect of the proposed cross-examination and on whether there is a reasonable likelihood that it will undermine the basis of the authorization. If the test is met, it is only at the conclusion of the *voir dire* that the trial judge will determine whether, on the basis of the amplified record, there still remains a basis for the authorization. …

Analysis

[9] Counsel for Mr. Patteri submits that much of the ITO content relies on the statements provided by Andrew Lyness and Jotham Apaloo. Counsel submits that, when referring to these statements, the ITO does not accurately represent what in fact was said in the statements. As stated in para. 6(4) of her Application: "The Applicant intends to prove that witness evidence was described in a false and misleading manner by putting the transcripts of their statements to the Affiant".

[10] When I compare these statements to the ITO, it is apparent to me that Cst. Gilroy has, in some instances, rephrased the words of Mr. Lyness and Mr. Apaloo, or made assumptions from what they said. Counsel for Mr. Patteri should have the ability to compare what was said in these statements to what was stated in the ITO. As such, these statements need to be before the judge hearing the ***Garofoli*** application.

[11] However, any questions that counsel might wish to ask Cst. Gilroy, would, in all likelihood, not add anything to her ability to simply point out in the ***Garofoli*** application any such apparent discrepancies or issues by comparing the ITO to the statements. Cross-examination of Cst. Gilroy as to why there were discrepancies, or whether any existed, does not add anything to what is visible on a comparison of the ITO with these witness statements. Any assumptions that Cst. Gilroy made, that were not validly made, or misrepresentations, do not require that he be cross-examined in order to point these out.

[12] Therefore, to the extent that Cst. Gilroy needs to be available for cross-examination for the purpose of putting these statements into evidence, and subject to

what I will state at the conclusion of this Ruling, I direct that counsel for Mr. Patteri be allowed to cross-examine Cst. Gilroy.

[13] Counsel also submits that she should be allowed to cross-examine Cst. Gilroy as to other areas of the ITO, apart from what he stated in the ITO that Mr. Lyness and Mr. Apaloo told him.

[14] Counsel submits that Cst. Gilroy's conclusion as to a handwriting comparison is unreliable, as Cst. Gilroy is not a handwriting expert (para. 23(a)(ii). However, there is nothing in the ITO that indicates that Cst. Gilroy has any particular expertise in handwriting. It would be reasonable to presume that he does not. Questioning him to confirm that he does not have any such expertise does not add anything to what counsel can simply point out in submissions.

[15] Another example is counsel's desire to cross-examine Cst. Gilroy on Steve Watson's comment that Mr. Patteri is bi-polar. Counsel submits that there was minimal evidence to support Mr. Watson's belief. In para. 25(e) of the ITO, it states that Mr. Watson informed him: "PATTERI is possibly Bi-polar but just assumes as 'everyone' is". It is clear on the face of the ITO that Mr. Watson had minimal evidence to support his assumption. Cross-examining Cst. Gilroy will add nothing to this.

[16] The same is true with respect to Cst. Gilroy including the information from Dean McLean that Mr. McLean believes Mr. Patteri does not like police (para. 26(f)). It is

clear on the face of the ITO that there is no basis provided for Mr. McLean's belief. Cross-examination of Cst. Gilroy will not add anything to this.

[17] Finally, counsel wishes to cross-examine Cst. Gilroy as to why he stated in para. 32(a) of the ITO that ammunition casings: "will show that a firearm was discharged from the property toward Apaloo JOTHAM [sic] and Andrew LYNESS". Counsel's submission is that simply locating bullet casings on Mr. Patteri's property pursuant to a search warrant, is not evidence that that these casings mean that they are related to shots being fired at Mr. Apaloo and Mr. Lyness. Again, this is an argument that is available on the face of the ITO. Nothing will be added by cross-examining Cst. Gilroy on this point.

[18] In conclusion, I do not, with one exception, believe that the cross-examination of Cst. Gilroy is necessary for Mr. Patteri to make full answer and defence. I find that there is not any likelihood that such a cross-examination will provide information that will contribute to counsel's ability to undermine the basis of the authorization for the warrant.

[19] The one exception, as stated earlier, is if cross-examination of Cst. Gilroy is the only way to have the statements of Mr. Apaloo and Mr. Lyness before the Court in the ***Garofoli*** hearing. I would therefore allow the cross-examination of Cst. Gilroy for the sole purpose of putting these statements before the Court. I do not, however, allow for Cst. Gilroy to be cross-examined for any other purpose other than this.

[20] These statements could, of course, be put into evidence before the judge hearing the ***Garofoli*** application by admission, thus eliminating the need for Cst. Gilroy to be called as a witness to introduce them into evidence.

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COZENS C.J.T.C.